Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1365

NORMAN F. DACEY,
Petitioner,

vs.

CHARLES S. HOUSE, ALVA P. LOISELLE,
JOSEPH W. BOGDANSKI, JOSEPH S. LONGO,
and WILLIAM P. BARBER,
Respondents.

AND

NORMAN F. DACEY,
Petitioner,

vs.

PETER C. DORSEY,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

Norman F. Dacey
3200 Park Avenue
Bridgeport, Conn. 06604
Petitioner, pro se

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The Petitioner, Norman F. Dacey, respectfully prays that writs of certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Second Circuit entered in the case of Dacey v. House et al on October 28, 1977, and in the case of Dacey v. Dorsey on January 12, 1978.

OPINIONS BELOW

The opinions of the District Court and of the Court of Appeals appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals in Dacey v. House et al was entered on October 28, 1977. A timely petition for rehearing, requested by the Petitioner, was denied on November 28, 1977.

The judgment of the Court of Appeals in Dacey v Dorsey was entered on January 12, 1978.

On February 8, 1978, Justice Thurgood Marshall, Associate Justice of the Supreme Court of the United States and Circuit Judge of the United States Court of Appeals for the Second Circuit, entered an order extending the time to file the petition for certiorari on both cases to and including April 26, 1978. This petition for certiorari was filed within that extended time period. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

AS TO BOTH CASES:

1. Did the District Court and United States Court of Appeals err in both cases in that their decisions did not conform to the decision of the U.S. District Court in a companion case, Dacey v. Naruk, that a judge holding memberhip in the Connecticut Bar Association should properly recuse himself in any action involving the Association?

AS TO THE FIVE JUSTICES (HOUSE, LOISELLE, BOGDANSKI, LONGO and BARBER:

2. Did the Connecticut Supreme Court Justices' refusal to recuse themselves from hearing an appeal from a $60,000 money judgment against the Connecticut Bar Association, of which they were members, violate the Connecticut law forbidding judges from sitting on cases in which they had a material interest?

3. Did the Connecticut Supreme Court Justices refusal to recuse themselves violate Canon 3 of the Code of Judicial Conduct?

4. Were the Justices of the Connecticut Supreme Court entitled to rely upon the "special resolution" of the Board of Governors of the Connecticut Bar Association for effective exemption from the application to them of the statutory prohibition against their sitting in a case in which they had a material interest?

5. If the Connecticut Supreme Court Justices were statutorily disqualified from presiding, was their Court thereby improperly constituted and their judgment therefore without validity?

6. Did the District Court err in dismissing the complaint against the five state justices on the grounds of judicial immunity without determining whether they had acted unconstitutionally by presiding when they were disqualified by State law from doing so, or whether their actions had been carried out in furtherance of a conspiracy with fellow-members of the Connecticut Bar Association to deprive plaintiff Dacey of his right to due process, i.e. an impartial tribunal as mandated in Pierson v. Ray, 386 S Ct. 547 (1967)

7. Did the actions of the five state justices in depriving petitioner Dacey of due process constitute a violation of Title 18 U.S.C. Sections 241 and 242 and thus make available to Dacey civil relief under the civil counterpart, Title 42 U.S.C. Sections 1983 and 1985?

8. Did the District Court err in not granting petitioner Dacey injunctive relief from the judgment of the members of the illegally-constituted Connecticut Supreme Court?

AS TO THE RESPONDENT UNITED STATES ATTORNEY DORSEY:

9. Did Title 42 U.S.C. Section 1986 require respondent Dorsey to prevent or aid in preventing the deprivation of Dacey's constitutional right to an impartial tribunal.

10. Did the refusal and failure of U.S. Attorney Dorsey to investigate Dacey's charges that the five state justices had engaged in criminal violations of Title18 U.S.C. Sections 241 and 242, and civil violations of Title 42 U.S.C., Sections 1983 and 1985, constitute a violation by him of Title 42 U.S.C. Section 1986 and if it was such a violation by him, should not the District Court have granted Dacey's plea for injunctive relief from Dorsey's continuing refusal to fulfill his obligation under Section 1986?

STATUTES AND CANONS INVOLVED

1. Section 51-39 of the Connecticut General provides inter alia:

> "When there is so near a relationship between any judge and any party in any proceeding in court before him, or when any judge may be liable to contribute to the damages, costs or expenses of any... proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act."

2. Canon 3, Code of Judicial Conduct, provides, inter alia:

> "C. Disqualification
> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where....
> "(c)he knows that he individually... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding..."

3. Title 42, U.S. Code Section 1983 provides, inter alia:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress."

4. Title 42, U.S. Code Section 1985 provides, inter alia:

> "In any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, any act in furtherance of such conspiracy

whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the Unit ed States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

5. Title 28, U.S. Code Section 455 provides, inter alia:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein (emphasis added)."

6. Title 18, U.S. Code Section 241 provides, inter alia:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same...they shall be fined not more than $5,000, or imprisoned not more than ten years, or both."

7. Title 18, U.S. Code Section 242 provides, inter alia:

"Whoever, under color of law, statute or regulation, ordinance or custom, wilfully subjects an inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States...shall be fined no more than $1,000 or imprisoned for one year or both."

8. Title 42, U.S. Code 1986 provides, inter alia:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding Section [1985 of Title 42] are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do, if such wrongful act be committed shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action."

STATEMENT OF THE CASE

1. In 1966, Petitioner Norman F. Dacey wrote the best-selling book How To Avoid Probate. In 1967, the Connecticut Bar Association distributed nationwide a pamphlet which seriously libeled Dacey. On June 13, 1974, seven years later, a jury in the Superior Court of Connecticut found that the Association had maliciously libeled Dacey and awarded him $60,000 damages plus $7,500 counsel fees.

The Bar Association appealed the verdict to five of its own members acting under color of law as members of the Supreme Court of Connecticut. Dacey cited to that Court Section 51-39 of the Connecticut General Statutes, which prohibits a judge from sitting on any case in which he has a pecuniary interest, and Canon 3 of the Code of Judicial Conduct, which prohibits a judge from presiding on any action in which he has a financial interest or in which his impartiality might reasonably be questioned, and moved that they recuse themselves. The members of the Court, although reminded that by action of the jury and decision of the Connecticut Bar Association each of them was required to contribute to the damage award, nevertheless declined to recuse themselves and sat in judgment.

Two months later, the Board of Governors of the Bar Association passed a "special resolution" purporting to grant to any judge presiding on any phase of the libel action a remission of his future dues equal to any sum which he had been required to contribute to the damages of the libel action, an attempt to evade both the letter and the spirit of the State's "fair trial" statute.

The resolution was faulty on two grounds: (1) the Bar Association, a private organization, had no power or authority to waive, suspend or circumvent the effectiveness of a State law in its application to its members, (2) whereas the statute applied to "any judge who may be liable to contribute (emphasis added)," the resolution provided only for a refund of any such contribution in the form of a remission of future dues. Following passage of the resolution, the five Connecticut justices set aside the jury's verdict and ordered the case re-tried. Dacey v. Connecticut Bar Association, 170 Conn. 520 368 A.2d 125 (1976)

The Justices of the Connecticut Supreme Court made no attempt to find a solution to the problem of their individual disqualifications. Among the solutions which they could have explored were these:

(a) They could have recused themselves and asked the Governor to appoint five temporary justices from among members of the State judiciary or bar who were not members of the Defendant Association.

(b) They could have asked the Supreme Court of Massachusetts, Rhode Island or New York to hear the appeal in their stead.

(c) They could have reported the "case of first impression" to the United States Supreme Court for a decision on the appeal in recognition of the unusual circumstances of their own lawfully-required disqualification.

Dacey filed suit against the five Connecticut Supreme Court Justices in the United States District Court for the District of Connecticut, charging violations of Title 42 U.S. Code Sections 1983 and 1985 in that they had deprived him of due process, i.e. an impartial tribunal. Mayberry v. Penna. 95 S.Ct.499. He asked for money damages and injunctive relief from their illegal decision. The Honorable Robert C. Zampano, the U.S. District Judge who presided, acknowledged that he, too, was a member of the Connecticut Bar Association and therefore one of those ordered by the trial jury to contribute to the damages and costs of the libel action. Claiming that he was not prejudiced, however, he declined to recuse or disqualify himself, even when reminded that Canon 3 required him to disqualify himself if his impartiality "might reasonably be questioned," and despite the existence of Title 28 U.S. Code Sections 144 and 455. Instead, he dismissed the action out of hand, without consideration of the issues, solely on the grounds of judicial immunity, ignoring completely Dacey's plea for injunctive relief, a violation of Title 28 U.S. Code Section 455.

Dacey appealed this judgment to the Second Circuit, which affirmed on Oct. 28, 1978 Dacey moved for a re-hearing; this was denied on November 28, 1978.

Dacey next filed with Peter H. Dorsey, the United States Attorney for Connecticut, a formal complaint that the five justices had violated Title 18 U.S. Code Section 242, which makes it a criminal offense to deprive a citizen of his constitutional right to due process.

Dorsey declined even to investigate, much less to act upon the complaint, stating that he, too, was a member of the Connecticut Bar Association, and he would not bring charges against five of his fellow-members. A few months afterward, he was named as the new President of the Bar Association.

Dacey then filed suit in the U.S. District Court for the District of Connecticut charging the U.S. Attorney with violation of Title 42 U.S. Code Sections 1985 (conspiracy to deprive another of his civil rights) and 1986 which requires anyone "in a position to prevent or aid in preventing" the deprivation of civil rights to do so. Request was also made for injunctive relief from Dorsey's failure to enforce the law. Judge Zampano, the same U.S. District Judge who had earlier dismissed the action against the five justices, his fellow Bar Association members, insisted upon presiding over the action against the U.S. Attorney, dismissing it on grounds of prosecutorial immunity without consideration of the merits and without regard for the plea for injunctive relief. Dacey appealed to the Second Circuit which affirmed on January 12, 1978.

On May 22, 1978, ten years after the action was filed, retrial of Dacey's libel action against the Connecticut Bar Association began in the Superior Court of Connecticut. Dacey had earlier requested the Chief Administrative Judge of the Connecticut courts (an Associate Justice of the Connecticut Supreme Court) to assign it to a judge who was not a member of the Bar Association. He had replied that there were several non-Association-member judges

available to whom it could be assigned, and advised that he was forwarding the request to the Acting Administrative Judge at Bridgeport "to resolve the matter." (See Appendix I) In preliminary motions, the Acting Administrative Judge recused himself on the grounds that he was a member of the Connecticut Bar Association and therefore disqualified by law from presiding on the action, referring the case to another judge who was not a member of the Association.

When trial began, however, and Dacey asked the presiding judge, the Honorable Henry J. Naruk, to confirm that he was not a member of the Defendant Association, Judge Naruk acknowledged that in fact he was a member. Connecticut General Statute 51-39 and Canon 3 of the Canons of Judicial Conduct were thereupon cited to him and he was asked to recuse himself. He refused to do so. When Dacey stated his intention to disclose to the jury the fact of Judge Naruk's statutory disqualification, Naruk threatened to declare a mistrial, requiring Dacey to wait another ten years for his day in court. (Dacey, in his seventieth year, suffers from a terminal illness.) The first jury had required only five minutes to decide, on the basis of the evidence presented, that Dacey had been libeled. After continuously adverse rulings on evidence by Judge Naruk and certain irregularities by Dacey's counsel at the second trial, the jury found against Dacey. At the close of the action, Dacey discovered that his counsel had acquired during the period of preparation for the retrial, a "new partner" who at the time of the first trial and until shortly before the retrial had been a member of the law firm representing

the Defendant Bar Association, a fact which the lawyers chose not to disclose to Dacey.

Dacey promptly filed suit in the U.S. District Court for the District of Connecticut against Judge Naruk, charging violation of Title 42 U.S. Code Sections 1983 and 1985 and seeking monetary damages and injunctive relief from the verdict of the improperly-constituted Naruk court. The complaint specifically requested that the action be heard by a jury before a judge who was not a member of the Connecticut Bar Association. The Honorable Jon O. Newman, the U.S. District Judge who heard the action, promptly dismissed it without argument or a hearing on the grounds of judicial immunity, completely disregarding the plea for injunctive relief, against which there is absolutely no judicial immunity. When Dacey learned that Judge Newman was in fact a member of the Bar Association, he filed an Affidavit of Prejudice under Title 28 U.S.C. Code Section 144, calling upon Judge Newman to vacate his rulings and recuse himself. This Judge Newman did, acknowledging that the fact of his membership in the Association could raise a question of his impartiality. The action is now awaiting assignment to a visiting judge from outside the Connecticut District. Judge Newman's action affirmed the validity of the argument which Dacey has been making in all these cases -- that judges with a material interest in a case must recuse themselves.

Dacey has been unable to obtain counsel in any of these actions, members of the Bar being averse to identifying themselves with litigation against judges before whom they must argue their cases in the future. It has

therefore been necessary for your Petitioner to proceed pro se. The extent of Connecticut lawyers' fears of even the appearance of action against a judge is shown in an article reprinted herein as Appendix J describing the circumstances in which all lawyer-members of the Connecticut legislature voted unanimously in favor of all judicial nominations, even though some had privately expressed their opposition to some of the nominees. This provoked such disgust among the non-lawyer legislators that some of them voted "no" on all judicial appointments as as act of protest.

ARGUMENT

AS TO BOTH CASES:

1. DID THE DISTRICT COURT AND UNITED STATES COURT OF APPEALS ERR IN BOTH CASES IN THAT THEIR DECISIONS DID NOT CONFORM TO THE DECISION OF THE U.S. DISTRICT COURT IN A COMPANION CASE DACEY V. NARUK, THAT A JUDGE HOLDING MEMBERSHIP IN THE CONNECTICUT BAR ASSOCIATION SHOULD PROPERLY RECUSE HIMSELF IN ANY ACTION INVOLVING THE ASSOCIATION?

In both cases, Dacey seeks redress, by way of injunctive relief, for injury done his cause against the Connecticut Bar Association by jurists and a prosecutor who were members of that Association and who had material interests in that Association. Dacey v. House et al

complains that the five justices of the Connecticut Supreme Court should have recused themselves rather than sit on the appeal of the Connecticut Bar Association from a jury's award of $60,000 plus $7,500 counsel fees to Norman Dacey in the libel action titled Dacey v. Connecticut Bar Association despite the existence of Connecticut General Statute 51-39 which prohibits a judge from presiding on any case in which he has a pecuniary interest. Each of the justices was a member of the Bar Association and each was assessed a material amount of money to satisfy the judgment.

In Dacey v. Dorsey, the plaintiff complained that the U.S. Attorney refused to investigate the violation of the State law and of Title 42 U.S. Code Sections 1983 and 1985.

The five justices having reversed the jury and ordered the case of Dacey v. Connecticut Bar Association retried, that retrial then took place with Connecticut Superior Court Judge Henry J. Naruk presiding. When the State statute, Federal law and the Code of Judicial Conduct were cited to him and he was asked to recuse himself, he refused. Thereafter, Dacey filed suit in the U.S. District Court charging him with violations of the State and Federal laws. U.S. District Judge Jon O. Newman, presiding on the action, was a member of the Connecticut Bar Association and when the law was cited to him, he readily agreed that his membership in the Association disqualified him from presiding on the action in which injunctive relief was sought against the judgment of the Naruk court holding the Association free of liability in the libel action. See Appendix K. Thus a lack of uniformity

among U.S. District Courts on an identical issue was established.

Many precedents and authorities hold that uniformity of interp retation of Federal and State law is highly desirable and that one of the most important functions of this Court is to obtain and maintain such uniformity. By reversing and remanding to the U.S. District Court both the instant cases, with instructions that the court is to strictly observe Title 28 U.S. Code Section 1652 (which requires that U.S. Judges enforce State laws wherever they are patently not constitutional) by enforcing Section 51-39 of the Connecticut General Statutes by setting aside (under Title 28 U.S. Code Section 1651, the "all-writs" statute) the judgment of the five justices in overturning the State jury verdict in favor of Dacey in his libel action against the Connecticut Bar Association, and requiring U.S. Attorney Dorsey or his successor to investigate the behavior of the instant respondents, House et als, this Court can establish the uniformity of the decisions of the U.S. District Court for the District of Connecticut.

AS TO THE FIVE JUSTICES (HOUSE, LOISELLE, BOGDANSKI, LONGO and BARBER

2. DID THE CONNECTICUT SUPREME COURT JUSTICES' REFUSAL TO RECUSE THEMSELVES FROM HEARING AN APPEAL FROM A $60,000 MONEY JUDGMENT AGAINST THE CONNECTICUT BAR ASSOCIATION, OF WHICH THEY WERE MEMBERS, VIOLATE THE CONNECTICUT LAW FORBIDDING JUDGES

FROM SITTING ON CASES IN WHICH THEY HAD A MATERIAL INTEREST?

Section 51-39 of the Connecticut General Statutes provides, inter alia:

> "When there is so near a relationship between any judge and any party in any proceeding in court before him...or when any judge may be liable to contribute to the damages, costs or expenses of any proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act."

The Connecticut Bar Association was the defendant in the action which had come on for hearing on appeal before the respondents. Throughout his professional life, each of the five Justices of the Connecticut Supreme Court had been a loyal, dues-paying member of the defendant Association. Among the members of the Association were literally hundreds of individuals whom the justices regarded as personal friends and with whom they had played golf and socialized over the years. Some among the members were former law partners of the justices.

Each of the five had been recommended by the Association for appointment to the seat he held. Each had required and received the approval of the Judiciary Committee of the Connecticut General Assembly, every member of which is a member of the defendant Association. As they progressed upward through the Connecticut judiciary over the years, these same ap-

proval procedures applied to their periodic reappointments. It cannot be denied then that there existed what the statute referred to as "a near relationship" between the five justices and the Connecticut Bar Association.

The justices are members of a class of persons who had been assessed to contribute to the damages awarded by the jury in the Dacey libel action, and thus they had what the statute had identified as a "pecuniary" interest. However, the pecuniary interest was not the sole basis for the necessity of disqualification, nor even the principal basis. It is the fact of membership in the defendant bar association which necessitated the disqualification. It is not merely that a justice should be impartial; each must appear impartial. "Justice must not only be done, it must appear to be done." (Dosey, Constitutional Law) The Connecticut statute which debarred the justices from sitting was legislated in order to guarantee to citizens of Connecticut a fair and impartial hearing of their causes.

An article in the American Journal of Comparative Law (Vol. 18, p. 692, 1970) offers insight into the question of disqualification:

> "Most important to the various methods established by statute to assure judicial impartiality are measures designed to disqualify a judge from passing on cases in which he presumably lacks the objectivity necessary for the proper administration of justice. There are two categories of such measures: 'impediment' and 'suspicion.' The 'impediment' is an absolute irrebuttable legislative presumption that in a given set of circumstances a judge is incapable of functioning impartially. Whenever these circumstances are present, one of the parties may raise and argue the judge's ability to decide impartially unless, of course, the judge spontaneously recuses himself."

"The causes for an 'impediment' include:

"...(d) when the judge is directly interested in the proceedings."

"'Suspicion' is a more fluid concept than 'impediment.' One of the most common reasons for suspicion is friendship or enmity between the judge and any of the parties."

"Other circumstances which will render a judge suspect are:

"...(e) when the judge is a partner, shareholder, or administrator of a corporation or company interested in the case."

In the case in which the justices were asked to disqualify themselves, there can be no doubt that there existed an "impediment," an "absolute, irrebuttable legislative presumption," stated in Section 51-39 of the Statutes, that there existed a set of circumstances clearly indicative of the fact that they were "incapable of functioning impartially." Nor can it be questioned that they were "shareholders" or that there was "friendship" between them and the members of the defendant Assocation.

Thus, their interest was not only pecuniary. The lawsuit which had come before them had been in the headlines for ten years, as the Bar Association employed every legal strategem known to its members to avoid being called to account. It had been the subject of many sharply critical newspaper editorials, as well as letters-to-the-editor reflecting public scorn for the body. The Plaintiff in the action had become a source of continuing acute embarrassment to the members of the Association, all of whom bitterly resented his persistent pursuit of his libel claim. The justices had more than a monetary interest in the action, then. They shared with their fellow-members an intense dislike for the Plaintiff in the case -- which is to say that they were prejudiced against him. Proof of their dislike for him is found in their description of his estate planning practices as "sordid" in their denial earlier of his appeal against an injunction prohibiting him from advising on the establishment of inter vivos trusts as an instrument for avoiding probate. Grievance Committee of the Bar of Fairfield County v. Dacey, 154 Conn. 129, 222 A 2d 339.

Precedent calls for the disqualification of a member of a court who is identified with a bar association which is a litigant. In Brooklyn Bar Association v. King's County Bar Association (258 App. Div. 920, 16 N. Y. S. (2d) 751 (2nd Dept. 1939) the entire court was disqualified as members of the plaintiff bar association. In Goldfarb v. Virginia Bar, 421, U. S. 773 (1975), Mr. Justice Powell, who had once been a member of the Virginia Bar, recused himself. In the case involving Dacey and the Connecticut Bar Association, it was immediately apparent that it would be patently improper for a current dues-paying member of the defendant association to sit in judgment.

As Association members, the justices would not have been permitted to sit as jurors on the trial of the action. How, then, could they sit in judgment on it?

Precedent indicates that judges who are members of bar associations are unable to divorce themselves from prejudice in cases involving such associations. In connection with the publication of How To Avoid Probate in 1966, the New York County Lawyers Association brought an action in New York charging Dacey with criminal contempt of court for having written the book. The action, tried in the lower and appellate courts, was finally struck down overwhelmingly (6-1) in the New York Court of Appeals, 21 N. Y. 2d 695. Altogether during the course of the hearings 13 judges sat on the case, of whom six were members of the New York County Lawyers Association and seven were not. Significantly, all six judges who were members of the Association

found Dacey guilty, while the seven non-member judges found in his favor. It is obvious that members of a bar association involved in litigation are hopelessly disqualified by prejudice from sitting in judgment on such litigation.

The Seventh Amendment to the Constitution of the United States states that:

> "In suits at common law...no fact tried by a jury shall be otherwise re-examined in any court in the United States, other than according to the rules of common law."

The rules of common law provide that every citizen shall have the right to a fair trial -- "fair" includes a trial before an unbiased and impartial tribunal. Mayberry v. Penna. 95 S.Ct.499. When the justices denied Dacey a fair and impartial tribunal, they denied him due process, one of the most fundamental guarantees of the Constitution.

In General Constitutional Law (E.C.S. Wade and A.W. Bradley, Longman, London, 1965, p.653) it is stated:

> "The essence of a fair judicial decision is that it shall have been made by an impartial judge. The rule against bias...is that disqualification of judge from acting in a particular case can arise in two ways: (a) where he has any direct pecuniary interest, however small, in the subject matter of the inquiry; (b) where, apart from direct pecuniary interest, there is a real likelihood that the judge would

> have a bias in favor of one of the parties. Where bias is alleged, the reviewing court does not decide whether the decision was in fact biased, but whether in the circumstances a reasonable possibility of bias was established. The principle should be that justice should not only be done, it should undoubtedly and manifestly be seen to be done."

Following are excerpts from an authoritative article on the disqualification of judges which appeared in the Harvard Law Review (79:1435, May '66):

"The right to a trial before an impartial judge is an unquestioned part of our concept of due process of law....The fundamental principle that a man may not be a judge in his own case was recognized by the common law as early as Coke's time. The English courts extended the principle to judges who, while not named as parties, had a pecuniary or proprietary interest, even when the interest was quite remote. In 1865, a frequently-cited dictum indicated that there would be a disqualification "wherever [sic] there is a real likelihood that the judge would from kindred or any other cause, have a bias....When facts are alleged which support an inference of bias, the judge is disqualified even though in his own mind and heart he may actually be completely impartial. Such a result is justified in part because a direct inquiry into the judge's state of mind would be impracticable even if possible....Even when a judge acts honestly, however, the presence of prejudice will distort judgment."

The Yale Law Journal, in a 1941 article on the disqualification of judges, noted that "It is now almost universal practice for judges not to sit in cases involving corporations in which they own stock." The Connecticut Bar Association is a non-stock corporation, its members being the equivalent of owners. The Association has assets, that is, they have a pecuniary interest in the corporation. The respondent justices are among those owners and it is the owners of a corporation which the law and custom debar from sitting in judgment on an action involving the corporation.

In the section on "Constitutional Law: in Lord Halsbury's Law of England (1955) Vol. 2, pg. 67, we read:

> "Bias By Interest: It is an elementary principle that no man shall be a judge in his own cause. Therefore, where persons who have a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating it, the tribunal is improperly constituted and is without jurisdiction, and the court will grant an order of prohibition to restrain it from adjudicating, or an order of certiorari to quash a determination arrived at by it."
>
> "Any pecuniary interest, however small, in the matter in dispute disqualifies a person from acting as judge."

Appellees have sought to justify their defiance of the State law by claiming that they had a "duty to sit." They were the "court of last

resort," they claimed. The Bar Association was entitled to a hearing on its appeal, and they were the only ones who could hear that appeal. "Disqualification must yield to necessity," they asserted, "where to disqualify would destroy the only tribunal in which relief could be had and thus preclude determination of the issue." This is sophistry. The Appellant has not sought to "destroy the tribunal." Appellees should properly have recused themselves, thus creating five temporary vacancies on the Connectict bench only so far as the Dacey action was concerned, and inviting the Governor to fill five temporary appointments from the ranks of the Connecticut Bench and Bar, selecting persons without affiliation with the Connecticut Bar Association. It would be immeasurably simpler for the Governor to fill five such temporary vacancies than to fill one permanent vacancy -- many distinguished members of the Bar who for economic or other reasons would decline regular appointment to the Bench would gladly accept such a special assignment, regarding it as an interesting legal experience. Their duties would not have involved presiding over a long-drawn-out trial; a study of the briefs and a one-hour hearing of the appeal would have sufficed.

Alternatively, Appellees could have asked the Supreme Court of Massachusetts, Rhode Island or New York to sit in the novel circumstances in which they found themselves. Finally, they could have petitioned the United States Supreme Court to hear the appeal or to rule on the issue of their disqualification. They chose to do none of those things. They wanted to hear the appeal. They make no slightest

effort to test the willingness of any of these judicial bodies to assist in resolving the problem because they wanted to sit -- nay, they were determined to sit.

Concerning their claimed "duty to sit," they are at odds with the times.

> "The language of Title 28, Section 455, as rewritten in 1974, has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. Under the interpretation set forth in Edwards v. The United States, (5 Circ. 1974, 334 Fed. 370) a judge, faced with a close question of disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers, and witnesses at the hearings were unanimously of the opinion that the elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system. No judge, of course, has a duty to sit where his impartiality might reasonably be questioned...litigants ought not to have to face a judge where there is a reasonable question of impartiality (emphasis added)." (U.S. Code and Congressional News, Vol. 3, p. 6355)

The administration of justice in the United States rests upon the bedrock of due process. Half a century ago, the United States Supreme Court ruled in Tumy v. State of Ohio, 273 U.S. 510 (1927), that it was a violation of due process for a judge to decide a case in which he had a direct personal or pecuniary interest. Within

the past year, the Fifth Circuit spelled out the same doctrine:

> "The integrity of the judicial process requires that a judge wholly unconnected with [the parties to the litigation] should sit on the case. Due process requires no less." In re Martin, C.A. 5th, 5 Crim. 3151, June 30, 1977.

In State Ex Rel Brockman v. Proctor, 298 N.E. 2d 532 (Ohio 1973), the court held that:

> "A fair trial in a fair tribunal is the basic requirement of due process. To this end, no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome."

3. DID THE CONNECTICUT SUPREME COURT JUSTICES' REFUSAL TO RECUSE THEMSELVES VIOLATE CANON 3 OF THE CODE OF JUDICIAL CONDUCT?

Canon 3 of the Code of Judicial Conduct provides inter alia:

> "A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where
>
> ***
>
> "(c)he knows that he, individually...has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding...."

The phraseology of Canon 3 is incorporated into Title 28 U.S.C. Section 455, applicable to Federal judges. The law has been explained in these words:

> "A judge shall disqualify himself whenever he has a financial interest in the subject of the controversy, which is defined as a 'legal and equitable interest, however small,' and this disqualification is absolute and cannot be waived...."
>
> "The amended statute prohibits a judge from accepting from the parties a waiver of his disqualification where it is based upon any of the specific situations set forth in subsection (b) of the amended statute....Thus, a small financial interest cannot be waived under this provision of the bill....The Committee believes that confidence in the impartiality of.... judges is enhanced by a more strict treatment of waiver (emphasis added)."(U.S. Code and Congressional News, 1974, Vol. 3, pp. 6357-6362)

Thus we see that under both the Code of Judicial Conduct and the U.S. Code, nothing is de minimis, and a judge who has only ten cents worth of financial interest is disqualified. In Snaidach v. Family Finance Corp., 81 S.Ct. 1820, this Court held that $3.00 was not de minimis, and in the case of a California citizen who contested a non-appealable $10 traffic fine, it held that the $10 was not de minimis.

The justices have estimated their individual liability under the libel judgement as $16.33,

a figure which is grossly underestimated. The refund of this amount to them is too small to constitute a bribe, they contend. But if a traffic policeman accepted $16.33 for not writing a ticket, he would be charged with having accepted a bribe.

The entire purpose of the Code of Judicial Conduct is set forth in Canons 1 and 2 below:

> "Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.
>
> An independent and honorable judiciary is indispensible to justice in our society. A judge shall participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code shall be construed and applied to further that objective."
>
> "Canon 2. A Judge Should Avoid Impropriety and the Appearance Of Impropriety in All His Activities.
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Nor is the justice himself the one to determine whether or not he is impartial. The Supreme Court of New Mexico has held, for example, that

"a judge, even though blessed with all the virtues any judge ever possessed, shall not be permitted to exercise judicial power to determine the fact of his own disqualification." State ex. rel. Hannah v. Armijo, 35 N.M. 73, 28 P. (2d) 511, 512 (1933)

Thus, the independence of the judiciary is essential to promote public confidence and trust in it. For a justice to sit in judgment on a case involving, as a party defendant, an association of which the justice is a member, can have no result other than to question his impartiality.

"It is a well-recognized principle of natural justice that a man ought not to be a judge in his own case." Ellis v. Emhart Mfg. Co., 150 Conn. 501, 555.

The actions of the respondent justices have not promoted confidence in the integrity and impartiality of the judiciary. On the contrary, they have provoked a spate of editorials in leading Connecticut newspapers under such titles as "Who Judges The Judges?" and "Lawyers Ignore the Law." As the Waterbury Republican put it: "If ever there was a case involving an individual's constitutional rights, it is this one," while the New Haven Register observed: "Dacey has every right to be concerned, and so does the rest of the public." In their blatant violation of Canon 3, the respondent justices have given the American judicial system a black eye. If they go unrebuked, public confidence in the rule of law will suffer a great set back.

At one point in the proceedings attending the libel action, the Acting Administrative Judge of the Superior Court at Bridgeport was called upon to deal with a preliminary motion by the counsel for the defendant Association. He promptly recused himself on the grounds that he was a member of the defendant Association and therefore disqualified by statute from presiding. In the District Court proceedings against State Superior Court Judge Naruk, who sat on the retrial of the libel action, though disqualified, Dacey, the plaintiff in the action called upon U.S. District Court Judge Newman to recuse himself on the grounds that he was a member of the Connecticut Bar Association. He promptly did so. Dacey v. Naruk, U.S. D.C., Dist. of Conn. No. 77-279, 1978, unreported. Appendix K. Here both State and Federal judges view themselves as disqualified. Not so the respondent justices who chose to persist in their deliberate violation of Canon 3 of the Code of Judicial Conduct.

And in Re Murchison, 349 U.S. 133, 136 (1955) the court ruled that:

"Due process can be satisfied only by the existence of a truly impartial judiciary."

This simply echoed the early Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610) in which it was held that:

"No man ought to be a judge in his own case."

It is clear that the five justices violated Section 51-39 of the Connecticut General Statutes when they insisted upon presiding in the appeal from the judgment of the Superior Court in Dacey v. Connecticut Bar Association.

In Pierson v. Ray, 386 U.S. 547, 19 L ed. 2d 288 87 S Ct. 1213, the United States Supreme Court ruled that:

> "The intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge intentionally and knowingly deprives a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a 'minister' of his own prejudice.... A judge is liable for injury caused by a ministerial act; to have immunity that judge must have been performing a judicial function (emphasis added)."

In conspiring with the Bar Association to thwart the verdict of the libel jury, the five justices "intentionally and knowingly" deprived Petitioner Dacey of his constitutional right to an impartial tribunal. In so doing, according to Pierson, they acted not as justices but as ministers of their own prejudices. Thus, they have no immunity and are liable.

4. WERE THE JUSTICES OF THE CONNECTICUT SUPREME COURT ENTITLED TO RELY UPON THE "SPECIAL RESOLUTION" OF THE BOARD OF GOVERNORS OF THE CONNECTICUT BAR ASSOCIATION FOR EFFECTIVE EXEMPTION FROM THE APPLICATION TO

THEM OF THE STATUTORY PROHIBITION AGAINST THEIR SITTING IN A CASE IN WHICH THEY HAD A MATERIAL INTEREST?

On June 13, 1974, the Superior Court found for Dacey as Plaintiff in the libel action. The Defendant Bar Association promptly appealed the judgment to the Supreme Court of Connecticut. In a motion filed in September, 1974, Dacey called for their recusal. That motion was denied on November 3, 1974. On December 2, 1974, the justices conducted a formal hearing on the appeal, reserving decision. On January 20, 1975, the Board of Governors of the defendant Association passed the following:

> "RESOLUTION
> WHEREAS, one Norman F. Dacey has secured a judgment against this Association; and
> WHEREAS, this judgment is being appealed to the Supreme Court of Connecticut, and
> WHEREAS, this Board of Governors is vested by the constitution of the Association with certain powers in respect of the remission and suspension of members' dues and desires to remove even the suggestion of possible personal considerations from bearing upon any judge or justice participating in the litigation in question;
> NOW THEREFORE, Be It Resolved that, in view of the provisions of Section 51-39 of the General Statutes, if a final judgment for money damages in favor of the plaintiff is rendered in the case of Norman F. Dacey v. The Connecticut Bar Association, then upon satisfaction

of such money judgment the dues which would otherwise thereafter become payable by each judge of the Superior Court and each justice of the Supreme Court who renders or participates at any stage in an proceeding, order, ruling or decision in said case shall be suspended in an amount bearing the same ratio to the aggregate payments made in satisfaction of said judgment as the ratio between the number one (1) and the total number of persons shown by the records of the Association to be dues-paying members on the date of such judgment."

This incredibly-transparent attempt to evade the letter and spirit of Connecticut Statute 51-39 must rank as one of the sorriest examples of the utter lack of integrity which characterizes some members of the Bench and Bar. The Board of Governors knew about the resolution, and the respondent justices knew about it, but not one word of its existence was made known to the membership at large -- and understandably. The resolution was utterly without validity. The justices denied the motion for recusal on November 3, and sat in judgment on the appeal on December 2. On the day that they heard the appeal, they were not subject to any remission of dues. It was not until seven weeks later that they and other bar association members concocted the shabby resolution in an attempt to make honest men out of them retroactively. We can only speculate on the fear of retribution for their deliberate violation of the law which motivated them to negotiate for the resolution. It beggars understanding that these five supposedly distinguished jurists should stoop to so demean themselves and the office they hold.

That a justice of a state's highest court is not above wrong-doing was shown by the recent judicial censure of an Associate Justice of the New York Court of Appeals, a jurist who only recently was a leading candidate for elevation to the post of Chief Justice.

The Connecticut Bar Association is a private organization which has no power or authority to grant its members an exemption from the applicability to them of a State law. Nor has any private organization the right to "bribe" a public official to perform his duty in such a manner as to favor such private organization. That the Association itself had misgivings about the propriety of its action is suggested by the fact that it has never apprised its membership of the existence of the resolution. In other words, the resolution was never authorized by that membership upon whom the exclusion of the respondent justices from the obligation of having to contribute would place an extra financial burden to make up for the dispensation granted.

The faultily-drawn resolution purports to offer remission of dues for a judicial contribution to the "money damages" awarded in the libel action but it fails to cover the costs of the action, including the counsel fees for the prestigious law firm which for a period of ten years orchestrated every legal stratagem known to the profession to avoid being brought into court. This latter expense might well exceed the amount of the judgment.

Section 51-39 of the General Statutes reads: "When any judge may be liable to contribute, etc." The so-called "special resolu-

tion" did not eliminate the liability to contribute- it simply provided for a refund, in the form of dues remission, of any amount which a judge had already paid out. Thus, the resolution did nothing to remove the liability to contribute which the statute specified as the occasion for disqualification. If after paying his share of the damages a judge died, there would be no more dues and therefore no "remission." If the Association ceased to exist - being replaced, for example, by an integrated bar -he would enjoy no "remission." If other Association members argued that the judge should pay his fair share of the financial burden, or if the approximately 1,000 new members argued that they were not members at the time of the libel and should not be burdened with the penalty for it, or if the remaining 4,500 older members who were never notified of the resolution argued that since they were not advised of the Association's operations attending the libel or offered an opportunity to express their approval or disapproval of it, they should not now be liable for the damages, the respondents' personal liability could greatly increase to the point where it would not be significantly offset by a remission of their dues. For these and other reasons, the "special resolution" failed in its transparent purpose to evade the State law.

In the circumstances, the respondent justices were not entitled to rely upon remission of dues as a justification for violating the State law.

5. IF THE CONNECTICUT SUPREME COURT

JUSTICES WERE STATUTORILY DISQUALIFIED FROM PRESIDING, WAS THEIR COURT THEREBY IMPROPERLY CONSTITUTED AND THEIR JUDGMENT THEREFORE WITHOUT VALIDITY?

In Gruman v. Raymond and Betts, 1 Conn. 40, 1814, which involved a successful suit for damages against a judge who had issued an illegal warrent, it was held that:

> "There must be a jurisdiction of the process as well as of the person and cause. There is no process sanctioned by law in which a disqualified judge may serve on the bench. Where there is want of jurisdiction over the cause, it is the same as though there were no court. It is coram-non-judice.... Although here the justice had jurisdiction over the subject matter, yet he had no jurisdiction over the process (emphasis added)."

Nothing could be clearer. "There is no process sanctioned in law by which a disqualified judge may serve on the bench," it says. But the instant justices, absolutely disqualified according to Connecticut Statute 51-39, did serve. The acts with which they have been charged were not, therefore, "within their process jurisdiction."

"Where there is want of jurisdiction over the cause," said the Connecticut court, "it is the same as though there were no court." These Appellees had routine jurisdiction over the process -- that is, they were assigned to review cases appealed to the Supreme Court --

but in the case of Dacey v. The Connecticut Bar Association, they were disqualified by law. They had no jurisdiction. There was no court, then; they only pretended to be a court. They acted, as Section 1983 puts it, "under color of law" and what they did had the appearance of legality but it was in fact, illegal.

To determine whether the justices acted without jurisdiction, one must first ask: "What is jurisdiction?'

(a) "Jurisdiction" is the right of a tribunal to exercise its power with respect to a particular matter (emphasis added)." Ballantine's Law Dictionary, p. 690.

However valid may have been the justices' right to exercise power over a general class of matters which might be presented for their attention, they lacked the power or authority to adjudicate a particular matter, Dacey v. Connecticut Bar Association. Lacking the right to exercise power over that particular matter, they lacked jurisdiction over it.

(b) "The test of the jurisdiction of a court is whether or not it has power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong (emphasis added)." Board of Commissioners of Lake County v. Platt, 79 Fed. 567, 25 C.C.A. 87

The Connecticut statute specifically disqualified the respondent justices from entering upon the particular inquiry in Dacey. Having no power to enter upon the inquiry, they lacked jurisdiction.

(c) "[Jurisdiction] is the right of a judge to pronounce a sentence of the law on a case or issue before him (emphasis added)." In re Ferguson, 9 Johns N.Y. 239; Hopkins v. Com., 3 Metc. (Mass.) 461.

The statute said that the justices had no right to act on the particular case before them. Lacking that right, they lacked jurisdiction over the particular case before them.

(d) "[Jurisdiction] is the right to adjudicate concerning the subject matter in the given case (emphasis added)." Reynolds v. Stockton, 140 254, 268, 11 Sup.Ct. 773, 35 L ed. 716.

In the "given case" here involved, Dacey the justices were prohibited by statute from sitting in judgment, and being prohibited, they lacked "the right to adjudicate," meaning that they lacked jurisdiction.

(e) "Jurisdiction" is authority to decide the case either way (emphasis added)." The Fair v. Specialty Co., 228 U.S. 22, 25, 33 Sup. Ct. 410, 57 L. ed. 716

In the matter here at issue, the justices were by law denied the right to decide the case either way. Thus, according to the Supreme Court's standards, they lacked jurisdiction.

(f) "No agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do (emphasis added)." 1896 I.O.B. 35

Here we are told that if a statute forbids a judge to perform an act, no "agreement" (e.g. one purporting to provide a remission of dues) can empower him to perform that act. If the Appellees were not empowered to perform the act of sitting in judgment on the appeal in Dacey, they lacked jurisdiction in the matter. Acting, they acted without jurisdiction.

(g) "[Jurisdiction] is the power to hear, determine and adjudicate (emphasis added)." 76 SD 210 75 NW 2d 641, 644.

The justices obviously could not have had jurisdiction in Dacey, for they were expressly deprived by statute of the "power to hear," a case in which they were among the defendants liable to contribute to the damages and costs. Being deprived of that right, they lacked jurisdiction.

In the face of this wealth of authoritative opinion that the Appellees lacked jurisdiction in performing the act of presiding on Dacey, they cannot claim immunity from the consequences of that illegal act. (Pierson v. Ray, 386 S. Ct. 547 (1967)

In Bradley v. Fisher, 13 Wall. 335, 347 20 L Ed. 646 (1872), the court held that:

> "Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority when the want of jurisdiction is known to the judge no excuse is permissible (emphasis added)."

In Gregory v. Thompson, 500 F. 2d 59 (1974), too, the Court held that "an exception to the sweeping cloak of immunity" exists for acts done in "the clear absence of jurisdiction." The Appellees had full knowledge of the Connecticut statute which precluded their sitting on Dacey. They chose to proceed in "the clear absence of jurisdiction," and they cannot now claim immunity for their illegal act.

In Rhodes v. Houston, 202 F. Supp. 624 (1962), it was held that there is no judicial immunity where a judge acts in the clear absence of jurisdiction, as was the case with these respondent justices who had been denied process jurisdiction by action of a State statute.

In Franklin v. Meredith, 386 2d 958(1967), the court held that a judge accused of corrupt or malicious conduct in connection with acts not within his judicial discretion has no immunity. The acts of which these justices stand accused were not within their official discretion, and therefore they have no immunity.

In Muller v. Wachtel, 345 F. Supp. (1972) it was held that a State court justice is not immune from liability under the Civil Rights Act in the presence of allegations that he acted beyond his discretion, as did these justices.

In Gregory v. Thompson, supra, too, it was held that a judge enjoys no immunity from suit for acts performed administratively. The decision of the Appellees to preside on Dacey was an administrative, as distinguished from a judicial one.

It is clear that the court convened by the five justices in Dacey was illegally and improperly constituted and that the judgment of that court was, accordingly, without validity.

6. DID THE DISTRICT COURT ERR IN DISMISSING THE COMPLAINT AGAINST THE FIVE STATE JUSTICES ON THE GROUNDS OF JUDICIAL IMMUNITY WITHOUT DETERMINING WHETHER THEY HAD ACTED UNCONSTITUTIONALLY BY PRESIDING WHEN THEY WERE DISQUALIFIED BY STATE LAW FROM DOING SO, OR WHETHER THEIR ACTIONS HAD BEEN CARRIED OUT IN FURTHERANCE OF A CONSPIRACY WITH FELLOW-MEMBERS OF THE CONNECTICUT BAR ASSOCIATION TO DEPRIVE PLAINTIFF DACEY OF HIS RIGHT TO DUE PROCESS, i.e. AN IMPARTIAL TRIBUNAL AS MANDATED IN PIERSON V. RAY

Article II of the Constitution provides that "judges, both of the supreme and inferior courts shall hold their offices during good behavior." Deliberate violation of the fundamental constitutional right of a citizen to a fair and impartial tribunal cannot be construed as "good behavior" on the part of a judge. Accordingly, since in the course of depriving Dacey of his constitutional rights, the justices engaged in a course of conduct which could not be characterized as "good behavior," they are now subject to removal from office. But how is that removal to be accomplished if the appropriate U.S. District Court declines to examine their conduct on the grounds that they enjoy immunity from suits for damages? In what forum

is injunctive relief and the impropriety of their acts to be determined, if not in the U. S. District Court?

When a President of the United States was charged with improprieties, he was immune from arrest and conviction -- but he was not immune from an investigation to disclose the fact of his wrong-doing, or from impeachment and removal. The emphasis was upon uncovering the extent and circumstances of his crime, not on the nature of his punishment. The mere fact that a man cannot be punished should not be a deterrent to an investigation and correction of what he has done.

The five justices in this action have been guilty of wrongdoing, too, and even if the courts below believe that their judicial robes protect them from a claim for money damages, they cannot rule that they may not suffer injunctive restraint and public disclosure of their acts. The courts below cannot rule that they enjoy immunity from being found out.

It is the nature of a course of action which determines whether or not it is wrong, not the identity of the person acting. A citizen who is prepared to support a charge that he has been deprived of his constitutional rights is entitled to have the facts of his complaint examined in a court of law and a determination made as to whether or not his complaint is a valid one. Whether any person or class of persons is or is not immune from a suit for damages is beside the point, which is that the citizen is entitled to have the fact of the violation examined and placed in the record, and appropriate injunctive relief granted. If there

has been a violation of the law, someone's claimed immunity from punishment is no excuse for sweeping the violation under the carpet to hide it from public view. This country has had its fill of cover-ups in high places. For courts make themselves parties to such a cover-up is unthinkable.

This Court should consider thoughtfully the importance of maintaining the public's faith in the judicial system.

7. DID THE ACTIONS OF THE FIVE STATE JUSTICES IN DEPRIVING PETITIONER DACEY OF DUE PROCESS CONSTITUTE A VIOLATION OF TITLE 18 U.S.C.SECTIONS 241 and 242 AND THUS MAKE AVAILABLE TO DACEY CIVIL RELIEF UNDER THE CIVIL COUNTERPART, TITLE 42 U.S.C.SECTIONS 1983 AND 1985?

Title 18 U.S. Code Sections 241 and 242, make it a criminal offense to deprive a citizen of the rights secured to him by the Constitution including the right to due process. A fair trial before an impartial tribunal is implicit in the concept of due process. The five justices denied petitioner Dacey the right to such an impartial tribunal and forced him to rely upon the judgments of persons inseparable from a party to the action. Thus, they violated Title 18 U.S. Code Section 241 in that they violated Dacey's civil rights, and Section 242 in that they entered into a conspiracy, the operative instrument of which was the "special resolution" negotiated with the Board of Governors of the Defendant Bar Association, to deprive Dacey of his civil right to an impartial tribunal.

In the course of carrying out the deprivation of Dacey's civil right to due process, the justices deliberately and flagrantly violated Section 51-39 of the General Statutes of Connecticut and Canon 3 of the Code of Judicial Conduct. In Mayberry v. Penna., 95 S.Ct. 499, this Court held that an impartial tribunal is essential to the operation of due process. It is beyond question then, that the justices violated Sections 241 and 242, as well as the laws of the State of Connecticut which laws they had taken an oath to uphold. In U.S. v. Price, 86 S.Ct. 1152, 1157, Footnote 7, it was held that Title 42, U.S. Code, Sections 1983 and 1985 are the civil counterparts of Title 18 U.S.Code Sections 241 and 242. Accordingly, since the five justices had violated Sections 241 and 242, it follows that they were in violation of Sections 1983 and 1985. In so doing, they boldly challenged the Constitution's guarantees of due process.

8. DID THE DISTRICT COURT ERR IN NOT GRANTING PETITIONER DACEY INJUNCTIVE RELIEF FROM THE JUDGMENT OF THE MEMBERS OF THE ILLEGALLY-CONSTITUTED CONNECTICUT SUPREME COURT?

Legal authority and precedent both confirm that the actions of an improperly-constituted court are without validity. In the section on "Constitutional Law" in Lord Halsbury's Law of England (1955) Vol. 2, p. 67, it is stated:

> "Bias By Interest: It is an elementary principle that no man shall be judge in his own cause. Therefore, where persons who have a direct interest in the

subject matter of an inquiry before an inferior tribunal take part in adjudicating it, the tribunal is improperly constituted and is without jurisdiction, and the court will grant an order of prohibition to restrain it from adjudicating, or an order of certiorari to quash a determination arrived at by it. Any pecuniary interest, however small, in the matter in dispute, disqualifies a person from acting as judge (emphasis added)."

Title 28 U.S. Code Section 2283, as adopted in 1948, provides, inter alia:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress (emphasis added)...."

In his authoritative work, Law of Federal Courts (1976) Charles Alan Wright has written:

"In 1970 the Supreme Court rejected the notion that the statute states only a rule of comity. Speaking through Justice Black, the Court held that the statute is 'an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of three specifically defined exceptions (emphasis added).' Atlantic Coast Line R.Co. v. Brotherhood of Locomotive Engineers, 1970 90 S.Ct.1739, 1743, 398 U.W. 281, 286, 26 L Ed. 2d 234.

"The first of the exceptions to Section 2283 is 'as expressly authorized by Act

of Congress.' This does not mean that the Act of Congress must refer in terms to Section 2283. It is surely enough that it specifically says that an injunction may be granted against a proceeding in a State Court. Probably it is enough that the Act of Congress permits a Federal Court to stay any proceeding, though it does not mention states specifically. In Mitchum v. Foster, the Supreme Court said that the test is 'whether an Act of Congress, clearly creating a Federal right or remedy enforceable in a Federal Court of equity, could be given its intended scope only by a stay of a state court proceeding. 92 S. Ct. at 2160, 407 U.S. at 238.

"Applying that test the Court resolved [the question] by holding that an action under the civil rights statute, 42 USCA Section 1983, comes within this exception to the Anti-Injunction Act (emphasis added)."

"What if the action of the state officer is beyond his authority as a matter of state law? It [is] settled...that action by a state officer claiming to act under authority of the state can be enjoined, even if the state has not authorized such action. Home Tel. & Tel. Co. v. City of Los Angeles, 1913, 33 S.Ct. 312, 227 U.S. 278, St. L. Ed. 510."

Clearly, the statute provides for Federal Court injunctions against State Court proceedings in actions based upon Title 42 U.S.

Code Section 1983, which is the basis for the instant action. As Wright observes: "Today it provides the basis for forcing states to desegrate their schools." Accordingly, the U.S. District Court erred in ignoring the request for injunctive relief to halt enforcement of the judgment of the respondents' illegally-constituted court which acted in violation of State and Federal law to deprive the Petitioner of due process.

In Mitchum v. Foster, 407 U.S. 242, the Supreme Court ruled that:

> "The very purpose of Section 1983 was to interpose the Federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial (emphasis added).' Ex Parte Virginia, 100 U.S. at 346. Congress plainly authorized the Federal courts to issue injunctions in 1983 actions by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that Federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great immediate and irreparable loss of a person's constitutional rights. Ex Parte Young, 209 U.S. 123; cf. Traux v. Raich, 239 U.S. 33; Dombrowski v. Pfister, 380 U.S. 479."

In Baker v. Carr, 82 S. Ct. 691, 364 U.S. 186 (1962), this Court overturned the decision

of the Tennessee State Courts in a reapportionment case. In Shepard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1966, Dr. Sam Shepard had been sentenced by a State Court Judge in Ohio who permitted outrageous pre-trial publicity and behavior of the press in the courtroom and out that prejudiced the opportunity for Shepard to have a fair trial. Nine years after Shepard was imprisoned and long after his Ohio appeal rights had expired, the sentence of the State Court judge was overturned. Shepard was released by the U.S. District Court for the Federal District of Ohio on habeas corpus, and the State Court was ordered by the Federal judge to re-try Shepard within 60 days or set him free. The Sixth Circuit overturned that decision, but the Supreme Court upheld the District Court.

In Shaw v. Garrison, C.A. La. 1973, 467 F 2d 113, a U.S. District Court judge fashioned relief for Shaw, requiring the State Court and prosecutors to stop prosecuting Shaw. This decision was upheld by the Fifth Circuit.

The complete power of a U.S. district judge over any state officer when a constitutional question is involved was clearly stated in Ex Parte Virginia, 100 U.S. 346 shortly after the Fourteenth Amendment and the Civil Rights Act of 1871, now Title 42 U.S. Code Sections 1983 and 1985.

United States District Courts have had power over State Courts ever since the ratification of the Constitution, that power being derived from the supremacy clause of the United States Constitution. The power has been spelled out in the "all-writs" act, Title 28, U.S. Code, 1651.

In Gruman v. Raymond and Betts, 1 Conn. 40, 1814, the Connecticut Supreme Court ruled that:

> "There is no process sanctioned in law in which a disqualified judge may serve on the bench. Where there is want of jurisdiction over the cause, it is the same as though there was no court. It is coram non judice."

In the instant action against the disqualified justices, it was clear that when they sat on the appeal of Dacey v. Connecticut Bar Association, "there was no court" and the District Court erred in not granting Petitioner Dacey injunctive relief from the judgment of that non-court.

AS TO THE RESPONDENT UNITED STATES ATTORNEY DORSEY:

9. DID TITLE 42 U.S.C. SECTION 1986 REQUIRE RESPONDENT DORSEY TO PREVENT OR AID IN PREVENTING THE DEPRIVATION OF DACEY'S CONSTITUTIONAL RIGHT TO AN IMPARTIAL TRIBUNAL?

Title 42, U.S. Code, Section 1986 provides, inter alia:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same,

> neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented."

Section 1985 referred to above, provides that if persons act in concert to deprive another of his constitutional right to due process(e.g. by denying him an impartial tribunal) they have committed a tort, or injury, against him. Since Dorsey was the U.S. Attorney in the District of Connecticut when the five members of the Connecticut Supreme Court violated the Connecticut law against their sitting on an appeal of a case in which they had a material interest, as well as Sections 1983 and 1985, Dacey filed a criminal complaint with Dorsey about these violations and asked Dorsey to investigate them and to take appropriate action to prevent further erosion of Dacey's due process right to an impartial tribunal. Dorsey refused to investigate or to take any such action, and thus became liable to Dacey under Section 1986.

It is particularly significant that he did not even investigate, which conduct constituted a refusal to carry out his investigative function as distinguished from his prosecutorial function. He had a staff of 25 attorneys, as well as the facilities of the Federal Bureau of Investigation. Had he made a proper investigation and then advised the justices and the Bar Association that they appeared to be about to violate Dacey's civil rights, it is likely that such a point of view expressed by the United States Attorney would have deterred them from their illegal course. He chose not to do this, however.

10. DID THE REFUSAL OF U.S. ATTORNEY DORSEY TO INVESTIGATE DACEY'S CHARGES THAT THE FIVE STATE JUSTICES HAD ENGAGED IN CRIMINAL VIOLATIONS OF TITLE 18 U.S. CODE, SECTIONS 241 AND 242, AND CIVIL VIOLATIONS OF TITLE 42 U.S. CODE SECTIONS 1983 AND 1985 CONSTITUTE A VIOLATION BY HIM OF TITLE 42, U.S. CODE SECTION 1986, FROM WHICH HE HAD NO PROSECUTORIAL IMMUNITY AND IF IT DID CONSTITUTE SUCH A VIOLATION BY HIM SHOULD NOT THE DISTRICT COURT HAVE GRANTED DACEY'S PLEA FOR INJUNCTIVE RELIEF FROM DORSEY'S CONTINUING VIOLATION?

In Williams v. Hilliard, _ F 2d__, CA6, 1975, a plaintiff successfully sued a prosecutor for damages on the grounds that he had wrongfully exercised his "discretion" by choosing not to disclose the existence of an FBI report refuting evidence he subsequently introduced and which led to a conviction, later reversed. In the same action, damages were awarded against another official, a state investigator who had acted on the prosecutor's instructions. In Imbler v. Pachtman, 47 L. Ed 2 128, this Court asserted: "We would not grant [a prosecutor] absolute immunity from suits for violating pre-existing constitutional disclosure requirement if he committed these violations in bad faith." In the matter here at issue, it will be for the jury to decide whether the Defendant exhibited bad faith or simply gross incompetence.

"A prosecutor who, while acting within the scope of his duties in initiating and prosecuting a case, wilfully deprives the accused

of his constitutional rights is subject to criminal punishment under 18 USCS 242, which makes it a crime for a person, acting under color of law, to deprive another of any right protected by the Constitution or laws of the United States, and is subject to professional discipline and disbarment." (U.S. Supreme Court Digest, Lawyers' Edition, Civil Rights, Section 12.5)

In Tenney v. Brandhove, 341 U.S. 367, 98 L ed 1019, (1951) Mr. Justice Douglas said:

> "If a committee departs so far from its domain as to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune."

In Gittman v. Bolsinger, USDC, E. Dist. of Penna. 1971, unreported, it was ruled that prosecutors do not have blanket immunity for their discretionary acts, if these acts deprive anyone of his constitutionally-guaranteed rights, privileges or immunities.

In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 29 L Ed 2d 619, the U.S. Supreme Court held that a violation of the Fourth Amendment's command against unreasonable searches and seizures by a Federal agent acting under color of Federal authority, gave rise to a Federal cause of action for damages consequent upon the agent's unconstitutional conduct. No agent of the state or federal government is specially privileged in carrying out his duties. All are enjoined by the Civil Rights statutes to act constitutionally, and act otherwise at their peril.

A citizen who files a criminal complaint supported by facts is entitled to have that complaint examined. It might not have been necessary for Dorsey to act in his prosecutorial capacity -- if he made known to the justices his view that they were in danger of violating the law, it is likely that such an opinion from the U.S. Attorney would have deterred them in their plan. Instead, he ignored the written complaint completely for a full month, declined to discuss it when Dacey sought to press the matter in person, and ended by doing nothing.

Having established the fact of his violation of Section 1986, the District Court should have granted Dacey's plea for injunctive relief from Dorsey's continuance of his refusal to "prevent or aid in preventing" the deprivation of the Petitioner's civil rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and the cases summarily reversed and remanded to the United States District Court for action in accordance with Connecticut General Statute 51-39 and under the authority of Title 28 Section 1651.

Respectfully submitted,

Norman F. Dacey
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APPENDIX

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Reprint of newspaper article in the New Haven Register, March 14, 1978. J

Ruling of District Court in Dacey v. Naruk K

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NORMAN F. DACEY Plaintiff	:	CIVIL ACTION NO. B76-146
v.	:	
CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO and WILLIAM P. BARBER Defendants	:	

VERIFIED AMENDED COMPLAINT

1. This is an action brought to Title 42, Sections 1983 and 1985 of the United States Code to redress the deprivation of rights, privileges and immunities secured to the Plaintiff by the Constitution and laws of the United States.

2. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343.

3. Plaintiff Norman F. Dacey is a citizen of the United States and of the State of Connecticut and a resident of the Town of Southbury Connecticut.

4. Upon information and belief, it is alleged that the Defendants Charles S. House, Alva P. Loiselle, Joseph W. Bogdanski, Joseph S. Longo and William P. Barver are each citizens of the United States and State of Connecti-

cut.

5. The Defendant Charles S. House is and was at all times relevant hereto the Chief Justice of the Supreme Court of Connecticut.

6. The Defendants Alva P. Loiselle, Joseph W. Bogdanski, Joseph S. Longo and William P. Barber are and were at all times relevant hereto Associate Justices of the Supreme Court of Connecticut.

7. All of the Defendants are and were at all times relevant hereto dues-paying members of a trade association or craft union known as "The Connecticut Bar Association" an organization not known for the maintenance of high ethical standards of conduct in its trade or craft but rather one against many of whose individual members formal charges of illegal or unethical business conduct have been filed in literally thousands of instances in the past.

8. In 1966, the Plaintiff published a book, How To Avoid Probate, which explained in layman's language the mechanics and advantages of the inter vivos trust as a device for avoiding the abuses of the probate system. In its published review of the book, the American Bar Association noted that the procedures explained in it were identical with those set forth in the ABA's training manual on the subject, and found that the book "serves a useful purpose."

9. In 1967, the Connecticut Bar Association published a brochure attacking the Plaintiff and his book and containing statements which became the basis for a libel action

brought by the Plaintiff against the Association. On June 13, 1974, in case No. 129807 (Norman F. Dacey v. The Connecticut Bar Association), a jury in Superior Court in the State of Connecticut found that the Plaintiff had been deliberately and maliciously libeled by the Association and awarded him damages of $60,000.

10. On July 9, 1974, the Connecticut Bar Association "appealed" the said verdict and the judgment thereon to the Defendant dues-paying members of the Association acting under color of law in their capacity as Justices of the Supreme Court of Connecticut.

11. On or about October 24, 1974, the Defendant Charles S. House acknowledged to the Plaintiff through his attorney that all of the Justices of the Supreme Court of Connecticut were members of the Connecticut Bar Association and questioned whether such membership status would be raised as an impediment to the Court's hearing of the said appeal.

12. The Plaintiff responded by citing to the Defendants Connecticut Statute 51-39 which specifically prohibits any member of the bench from sitting in judgment on any case in which he has a pecuniary interest, or to the damages or costs of which he may be called upon to contribute. The Plaintiff also cited to the Defendants the tradition of the law and the Canons of Judicial Ethics which absolutely bar any member of the bench from sitting in judgment on a matter in which he has a financial or pecuniary interest. Finally, the Plaintiff drew the attention of the Defendants to his inalienable right

under the Constitution of the United States to a fair trial - that is, to a hearing before an impartial and unbiased court.

13. The endorsement and approval of the Connecticut Bar Association was an absolute prerequisite to the appointment of each of the Defendants to be a Justice of the Supreme Court of Connecticut. Since the Association's founding, no individual not a dues-paying member has ever achieved a seat on the Court. No individual can hope for appointment or reappointment to the Court without the approval of the Judiciary Committee of the Connecticut General Assembly, every member of which is a member of the Connecticut Bar Association. The future reappointment of each of the Defendants as a member of the Court is absolutely dependant upon the continued good will of the Connecticut Bar Association. Aside from their liability to contribute to the damages and costs involved in the Plaintiff's successful action against the Association, then, the Defendants were and are absolutely beholden to the Connecticut Bar Association, a party to the litigation, for their very jobs in the future. It was clearly evident that a fair hearing before the Justices of the Supreme Court of Connecticut was an impossibility, and the necessity for their disqualification was obvious to all.

14. Precedent calls for the disqualification of one or all of the members of a court which is a litigant. In Brooklyn Bar Association v. King's County Bar Association (258 App. Div. 920, 16 N.Y.S.(2nd)751 (2nd Dept. 1939) the entire court was disqualified as members of

the plaintiff bar association. No special exemption applies to Supreme Court Justices: "[They] have from the earliest times disqualified themselves from cases involving direct pecuniary interest. The practice was initiated in 1813 by Justice Livingston in Livingston & Gilchrest v. Maryland Insurance Company, and immediately followed by Chief Justice Marshall in Fairfax's Devisee v. Hunter's Lessee, decided the same way." (The Yale Law Journal, Vol. 5, 1941, p. 609) In the 1974 case of Goldfarb v. The Virginia Bar before the Supreme Court of the United States, Mr. Justice Powell disqualified himself on the grounds that he had once been a member of the Defendant Bar. In the case involving the Plaintiff and the Connecticut Bar Association, it was immediately apparent that it would be patently improper for five current, dues-paying members of the Defendant Association to sit in judgment.

15. Precedent indicates that judges who are members of bar associations are unable to divorce themselves from prejudice in cases involving such associations. In connection with the publication of How To Avoid Probate in 1966, the New York County Lawyers Association brought an action in New York charging the Plaintiff with criminal contempt of court for having written the book. The action, tried in the lower and appellate courts, was finally struck down overwhelmingly (6-1) in the New York Court of Appeals. Altogether during the course of the hearings a total of 13 judges sat on the case, of whom six were members of the New York County Lawyers Association and seven were not. Significantly, all six judges

who were members of the Association found the Plaintiff guilty, while the seven non-member judges found in the Plaintiff's favor.

16. The Yale Law Journal in a 1941 article on the disqualification of judges, noted that "it is now almost universal practice for judges not to sit in cases involving corporations in which they own stock." The Connecticut Bar Association is a non-stock corporation, and the Defendants are the equivalent of stockholders in that corporation. The "non-stock" character of the organization has no significance, being simply a device hopefully to evade liability in an action such as the one in which it has been found guilty of libel and ordered to pay damages. The simple fact is that the Connecticut Bar Association is a corporation which has assets. The owners of those assets are the members of the Association -including the Defendants- and it is the owners of a corporation whom law and custom debar from sitting in judgment on litigation involving the corporation.

17. The Seventh Amendment to the Constitution of the United States provides that "in suits at common law...no fact tried by a jury shall be otherwise re-examined in any court in the United States, other than according to the rules of common law." The rules of common law provide that every citizen shall have the right to a fair trial - "fair" meaning unbiased and impartial.

18. When the Plaintiff's action against the Connecticut Bar Association was tried in Superior Court in 1974, it was elementary that no

member of the Defendant Association was permitted to serve on the jury - indeed, even a distant relationship with an Association member would have barred a prospective juror. If no Bar Association member or relative of such member, because of obvious bias and personal interest, could have been permitted to serve as a juror, it followed that for the same reason no member of the Association could have been permitted to sit on the bench in judgment on the case.

19. Citing all of the foregoing, on November 3, 1974, the Plaintiff formally moved that each of the Justices of the Supreme Court of Connecticut, the Defendants herein, disqualify himself from sitting on the appeal in the aforementioned action.

20. On November 12, 1974, in utter disregard of legal propriety and the Constitutional rights of the Plaintiff, the Defendants rejected such motion and announced that they would hear what was, to all intents and purposes, their own appeal.

21. Well aware that their announced course of action would constitute a flagrant violation of Section 51-39 of the Connecticut Statutes, the Defendants thereafter on January 20, 1975 conspired with their follow members of the Connecticut Bar Association to cause the passage by the Association's Board of Governors of a special resolution granting to any judge or justice who had been or who might be called upon to sit in judgment in the case of Norman F. Dacey v. The Connecticut

Bar Association a remission of his annual dues equal to the amount of any damages which he might be called upon to contribute in settlement of the action - a transparent attempt at evading the spirit of a state statute enacted specifically to assure fair and impartial triałs. Curiously, the faultily-drawn resolution failed to exempt the Defendants from the financial responsibility for contributing to the not-inconsiderable costs of the action.

22. On December 2, 1975, in final disregard of an oral plea by the Plaintiff's counsel that the action proposed to be taken by the Defendants in flagrant violation of the state statute and of the Plaintiff's rights under the Constitution of the United States would impose an ineradicable stigma upon the American Bench and Bar, the Defendants estopped all further argument and proceeded with the "hearing" of their own appeal.

23. On April 6, 1976, the Defendants, reasserting their contention that there had existed no impediment to their hearing of the appeal, reversed the decision handed down by the jury in Superior Court in favor of the Plaintiff and remanded the case for a new trial.

24. The Defendants' ruling that they and their fellow-members of the Connecticut Bar Association were "not guilty" of the charges against them embodied in the Superior Court jury's findings of fact, was not in fact the decision of a court of law but simply the conten-

tion of one of the parties to the litigation, and in so ruling the Defendants made a mockery of justice and the judicial system in America. At a time when too many individuals in high places in government, including an inordinate number engaged in the practice of law, have been found to have violated the civil rights of citizens of the United States, the Plaintiff asserts that a line must be drawn somewhere, and charges that in carrying out the acts here complained of, the Defendants have over-stepped that line. In an editorial condemnation of the Defendants' action, a leading Connecticut newspaper, The New Haven Register, has asked: "Who Judges The Judges?" Another, the Waterbury Republican, has observed: "If ever there was a case involving an individual's constitutional rights, it is this one." The action of the Defendants in depriving the Plaintiff of one of the most fundamental and cherished rights of every American citizen - the right to a fair trial guaranteed by the Constitution of the United States - has thus outraged the American sense of justice and aroused indignation among members of the public which regards such action as an arrogant challenge to the Constitution which the Defendants had taken a solemn oath to defend.

25. The Defendants' violation of the Plaintiff's rights under the Constitution of the United States is echoed by their violation of Connecticut Statute 51-39 which declares that "when any judge may be liable to contribute to the damages, costs or expenses of any...proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act." This legal precau-

tion is duplicated in the statutes and decisions of other states, as well. In New Mexico, for example, it has been held that "a judge, even though blessed with all of the virtues any judge ever possessed, shall not be permitted to exercise judicial power to determine the fact of his own disqualification, not because the judge in doing so would attempt to act otherwise than conscientiously, but because...it is not fitting for him to make such an attempt, and it is better that the courts shall maintain the confidence of the people than that the rights of judge and litigant be served." In Pennsylvania disqualification is unquestioned, it being settled that "due consideration should be given by [the judge] to the fact that the administration of justice should be beyond the appearance of unfairness."

26. "Where investigation of the facts creating bias is necessary, the judge's conduct and associations usually become the focal point of consideration. Since the judge's statements are the clearest indication of his attitude, most courts have held that judicial condemnation of a litigant before trial is begun or during its course disqualifes the judge from trying the case." (The Yale Law Journal, Vol. 5, 1941, p. 609) In 1965, the same Connecticut Bar Association initiated an action which resulted in the issuance of an injunction prohibiting the Plaintiff, incidental to his professional estate planning practice, from advising on the establishment of trusts as a means of achieving probate avoidance. The Plaintiff's appeal to the Supreme Court of Connecticut to lift the injunction was rejected in a decision in which the Court

gratuitously applied the term "sordid" to the Plaintiff's activities, despite the fact that (1) there was nothing in the testimony at the hearing which reflected in any way upon the Plaintiff's character or motives, (2) the action was limited strictly to the technical question of whether what the Plaintiff had done had in fact constituted the practice of law, (3) a parade of witnesses testified without exception that what the Plaintiff had done had been done well and to the complete satisfaction of the witness, and (4) the Plaintiff had charged not a penny for the service he had rendered. When the Plaintiff's counsel petitioned the Court to strike the approbrious and unjustified word "sordid" from its decision, the Court refused to do so. Cloaked in their judicial immunity, the members of the Court were free to thus libel the Plaintiff, leaving him without legal recourse to recover from them for the damage done to his reputation. The Plaintiff's only recourse was to run a full-page advertisement in Connecticut newpapers expressing his opinion of the Court and its decision. That such action was in every respect proper and dignified was indicated by the fact that the Plaintiff was immediately invited to lecture at the University of Connecticut Law School on the ramifications of the case. All this was obviously painful to the members of the Supreme Court of Connecticut. That the Plaintiff's rebuke still rankled the Court during its consideration of the recent appeal is evident from the fact that in their decision reversing the jury verdict finding them and their fellow-members of the Connecticut Bar Association guilty of libeling the Plaintiff, the Defendants made petulant reference to the decade-earlier

advertisement and to what they described as its "acrimonius language," and recalled that it had quoted a classic denunciation of lawyers and judges written by Jonathan Swift in his book Gulliver's Travels. If "most courts have held that judicial condemnation of a litigant before trial is begun or during its course disqualifies the judge from trying the case," these Defendants were obviously disqualified from sitting on the appeal.

27. The Defendants and their fellow-members of the Connecticut Bar Association who co-sponsored the libelous attack upon the Plaintiff of which the Superior Court jury found them guilty publicly predicted a decade ago that persons making use of the forms for probate avoidance contained in the Plaintiff's book, How To Avoid Probate, faced disastrous legal complications, whereas in fact during the entire ten-year period since initial publication of the book, there has been only a single recorded instance, in Texas, where one such form has been legally contested - and in that instance the succession of courts before whom the matter was tried, including the Supreme Court of Texas, ruled without exception in favor of the legal validity of the form. That more than ten million such forms have been successfully used proves the hollowness of the predictions of the Defendants and their fellow-members of the Connecticut Bar Association, and serves to support the jury's findings that the Defendants and their fellow-members libeled the Plaintiff maliciously and without regard for the public interest. Their participation in such condemnation of a litigant before trial obviously disqualified the Defendants from sitting on the case involving the Plaintiff.

28. Title 42 USC, Section 1983, originally passed as Section 1 of the Civil Rights Act of 1871, 17 Stat 13, reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The words "every person" in the law mean exactly what they say. If the law intended to exempt persons who were judges, it would have said so. The law was enacted by the people through their elected representatives, and in the United States of America the people, not the courts, are sovereign. The courts are the servants of the people. No court has the authority to suspend the applicability of the law to its own members or to the members of any other court. The Supreme Court of the United States has held that immunity for judges can be justified only on the grounds that "the burden of defending damage suits brought by disappointed litigants would contribute not to principled and fearless decision-making but to intimidation." (Pierson v. Ray, supra, at 554, 18 L Ed 2nd 288, 87 S Ct 1213) This action is not an attack upon any decision of the Defendants but arises from the illegitimacy of their sitting as a court. It seeks redress for injury done the Plaintiff as a result of the Defendants' conspiracy to violate state

and federal law and their deliberate deprivation of the inalienable rights of a citizen of the United States. The Defendants are "persons" within the meaning of 42 USC, Section 1983. They have violated the law, and under its terms are liable for damages. The United States Supreme Court noted (in Imbler v. Pachtman, US, 47 L Ed 2nd 128, 96 S Ct) that "liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which 42 USC, Section 1983 was enacted."

29. This arrogant and conspiratorial misuse of legal authority by the Bench and Bar, all under color of law, depriving the Plaintiff of the rights, privileges and immunities guaranteed him by the Constitution and laws of the United States, also violates Title 18, Section 242, of the U.S. Criminal Code which specifies that "whoever, under color of law, statute or regulation, ordinance or custom, wilfully subjects an inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States... shall be fined no more than $1,000 or imprisoned one year or both." The deprivation of the Plaintiff's civil right by the Defendants has thus been incidental to the Defendants' commission of a federal crime. The United State Supreme Court recently held (Imbler v. Pachtman, US, 47 L Ed 2d 128, 96 S Ct) that "judges may be punished criminally for willful deprivations of constitutional rights on the strength of 18 USC, Section 242," thus confirming that judges are not im-

mune from liability for deliberate civil rights violations.

30. Article II of the Constitution of the United States provides that "judges, both of the supreme and inferior courts, shall hold their offices during good behavior." Deliberate violation of the fundamental constitutional rights of a citizen cannot be construed as "good behavior" on the part of a judge. Accordingly, since in the process of depriving the Plaintiff of his constitutional rights the Defendants engaged in a course of conduct which could hardly be characterized as "good behavior," they are now subject to removal from office.

31. The degree to which the improper action of the Defendants has worked to cause the deprivation of the Plaintiff's civil rights is indicated by the fact that he has been unable to find any Connecticut attorney sufficiently unintimidated by the fear of retaliation by the Defendants in the course of his future practice of law as to be willing to participate in the filing of this Complaint.

WHEREFORE, the Plaintiff claims from the Defendants:

1. Five Million ($5,000,000.00) Dollars damages.
2. Five Million ($5,000,000.00) Dollars punitive damages.
3. Such other and further relief as the Court deems fair and equitable.

Dated at Bridgeport, Connecticut
this 14th day of May, 1976.

/s/ Norman F. Dacey
Norman F. Dacey

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NORMAN F. DACEY Plaintiff	:	
v.	:	CIVIL NO. B-76-146
CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO and WILLIAM P. BARBER Defendants	:	

RULING ON DEFENDANTS' MOTION TO DISMISS

Defendants, all the Justices of the Connecticut Supreme Court move to dismiss plaintiff's claim for failure to state a claim upon which relief can be granted. F.R. Civ. P. 12 (b) (6).

I

Plaintiff, acting pro se, seeks damages, pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985, for defendants' refusal to disqualify themselves in an appeal from a $60,000 jury verdict in plaintiff's favor against the Connecticut Bar Association (hereinafter "CBA") on June 13, 1974. Dacey v. Connecticut Bar Assn. 170 Conn. 520 (1976). The gravamen of plaintiff's complaint rests on the fact that at all times during the course of the appeal, defen-

dants were dues paying members of the CBA and as such would themselves be liable for a pro rata share of the damage award ($16.33 each), in violation of Conn. Gen. Stat. § 51-39. 1/

During the pendency of the appeal, the Reporter of Judicial Decisions notified both parties that all the Justices of the Supreme Court were members of the CBA and inquired if either party intended to raise that issue as a possible bar to their presiding on the appeal. On November 3, 1974, plaintiff moved that the Justices disqualify themselves. The Supreme Court denied the motion on November 12, 1974. On January 20, 1975, in an effort to avoid any possible appearance of impropriety, the Board of Governors of the CBA adopted a resolution suspending the dues of any Superior Court Judge and Supreme Court Justice who presided at any stage of the plaintiff's case in an amount equal to the pro rata share required by each member of the CBA to be paid in satisfaction of any money judgment. On April 6, 1976 the Supreme Court reversed the decision and remanded the case for a new trial.

II

This Court declines to reach the merits of the underlying controversey because it finds that the motion to dismiss for failure to state a claim must be granted. It is unquestioned that judges are absolutely immune from suits for damages. This doctrine was well established at common law, Bradley v. Fisher, 13 Wall 335 (1872), and has been preserved under § 1983. Pierson v. Ray, 386 U.S. 547, 554-555 (1967). See also Imbler v. Pachtman, 424

U.S. 409, 418. 2/

Accordingly, the motion to dismiss is granted.

Dated at New Haven, Connecticut, this 16th day of February, 1977.

Robert C. Zampano
United States District Judge

FOOTNOTES

1/ Section 51-39 reads in pertinent part as follows:
When there is so near a relationship between any judge and any party in any proceeding in court before him, as between father and son, brothers or uncle and nephew, by nature or marriage, or landlord and tenant; or when any judge may be liable to contribute to the damages, costs, or expenses of any such proceeding, or when he may receive a direct pecuniary benefit by the determination thereof, he shall be disqualified to act, except as herein provided. No judge shall be disqualified to act in any proceeding by reason of his being a member of any ecclesiastical corporation, unless it is a party to the action, nor in any proceeding in which any town, city or borough is a party or interested, by reason of his being an inhabitant thereof or liable to taxation therein or by reason of his being related to any taxpayer or inhabitant thereof. When any judge is disqualified to act in any proceeding before him, he may act if the parties thereto consent in

open court.

2/ Plaintiff reasons that because defendants should have disqualified themselves pursuant to Conn. Gen. Stat. § 51-39 that they were acting without jurisdiction and, therefore, not cloaked with judicial immunity. See Pierson, supra at 554. This rationale equates disqualification with lack of jurisdiction, a fallacious equation. Cf. Conn. Gen. Stat. § 51-42.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of October one thousand nine hundred and seventy seven.

Present: Hon Sterry R. Waterman, Hon. Robert P. Anderson, Hon. Walter R. Mansfield, Circuit Judges

Norman F. Dacey, Plaintiff-Appellant	:	
v.	:	
Charles S. House, Alva P. Loiselle, Joseph P. Bogdanski, Joseph S. Longo and William P. Barber, Defendants-Appellees	:	77-7301

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and counsel for the appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed on the ground that the case is governed by the well-established prin-

ciple that judges are absolutely immune from suits for damages based on acts within their jurisdiction, Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Imbler v. Pachtman, 424 U.S. 409, 418 (1976); Bradley v. Fisher, 13 U.S. (Wall) 335 (1871).

/s/ Sterry R. Waterman
STERRY R. WATERMAN

/s/ Robert P. Anderson
ROBERT P. ANDERSON

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of November, one thousand nine hundred and seventy-seven.

Present: Hon. Sterry R. Waterman, Hon. Robert P. Anderson, Hon. Walter R. Mansfield, Circuit Judges

NORMAN F. DACEY	:	
Plaintiff-Appellant	:	
v.	:	
CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH P. BOGDANSKI, JOSEPH S. LONGO, and WILLIAM P. BARBER	:	77-7301
Defendants-Appellees	:	

A petition for a rehearing having been filed herein by pro-se appellant,

Upon consideration thereof, it is ordered that said petition be and it hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

NORMAN F. DACEY	:	CIVIL ACTION NO.
Plaintiff	:	B-76-190
	:	
v.	:	
	:	July 7, 1976
PETER C. DORSEY	:	
Defendant	:	

::::::::::::::::::::::::::::::::

COMPLAINT

1. This is an action brought pursuant to Title 42, Section 1986 of the United States Code to redress the deprivation of rights, privileges and immunities secured to the Plaintiff by the Constitution and laws of the United States.

2. Jurisdiction is conferred on this Court by Article 1, Section 3 of the Constitution of the United States, and by Title 28 U.S.C. Section 1343.

3. Plaintiff Norman F. Dacey is a citizen of the United States and of the State of Connecticut, and a resident of the Town of Southbury, Connecticut.

4. Upon information and belief, it is alleged that the Defendant is a citizen of the United States and the State of Connecticut.

5. The Defendant is and was at all times relevant hereto United States Attorney for the

District of Connecticut.

6. On June 13, 1974, a jury in the Superior Court of Connecticut at Bridgeport found that the Connecticut Bar Association had maliciously libeled the Plaintiff and awarded him $60,000 damages. The Defendant Bar Association appealed the decision to the Supreme Court of Connecticut, the same consisting of five justices, namely: Charles S. House, Alva P. Loiselle, Joseph W. Bogdanski, Joseph S. Longo and William P. Barber. All of the members of the said Court are and were members of the Connecticut Bar Association and thus co-defendants in the libel action.

Following are excerpts from an authoritative article on the disqualification of judges which appeared in the Harvard Law Review (79: 1435, May '66):

"The right to a trial before an impartial judge is an unquestioned part of our concept of due process of law.... The fundamental principle that a man may not be a judge in his own case was recognized by the common law as early as Coke's time. The English courts extended the principle to judges who, while not named as parties, had a pecuniary or proprietary interest, even when the interest was quite remote. In 1865, a frequently-cited dictum indicated that there would be a disqualification 'wherever [sic] there is a real likelihood that the judge would from kindred or any other cause, have a bias.... When facts are alleged which support an inference of bias, the judge is disqualified even though in his own mind and heart he may actually be completely im-

partial. Such a result is justified in part because a direct inquiry into the judge's state of mind would be impracticable, even if possible....Even when a judge acts honestly, however, the presence of prejudice will distort judgment.'"

The Plaintiff drew the attention of the five members of the Court to the applicability of Section 51-39 of the General Statutes of Connecticut which expressly prohibits any judge from acting in a matter in which he has pecuniary interest or to the damages or costs of which he may be called upon to contribute. The Plaintiff also cited his constitutional right to a fair trial-that is to a trial before an impartial and unbiased court - and requested that the five justices disqualify themselves forthwith.

7. Despite such a citation and request by the Plaintiff, the five individuals thereafter conspired to deprive and did deprive the Plaintiff of his constitutional right to such fair trial and on December 2, 1975, they conducted a hearing on the Bar Association's appeal, reserving decision.

8. On or about March 1, 1976, the Plaintiff filed with the Defendant a formal Complaint that the members of the Court appeared to be about to deny him his constitutional right to a fair trial and requested the Defendant to initiate action to prevent such deprivation of the Plaintiff's civil rights.

9. Title 42 Section 1985 of the U.S. Code provides that:

"...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators (emphasis added)."

A Section 1985 action has been instituted in this Court by the Plaintiff charging the five individuals with conspiracy to deny him his constitutional rights and seeking damages.

Title 42 Section 1986 of the U.S. Code provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding Section [1985 of Title 42] are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...."

10. In his capacity of United States Attorney, the Defendant was not only in a position to

"prevent or aid in preventing" the violation of the Plaintiff's civil rights, but it was also his official duty to do so. Notwithstanding his full knowledge of the imminence of the violation, he took no steps to preserve the Plaintiff from such intended violation, citing as a reason for such failure the fact that he was a fellow-member of the offending justices in the Connecticut Bar Association.

Thereafter, on April 6, 1976, the five offending justices of the Connecticut Supreme Court bench officially confirmed and completed their deprivation of the Plaintiff's civil rights by announcing their formal rejection of his petition that they comply with State and Federal law and disqualify themselves. They then reversed the Superior Court jury's decision in the libel action and remanded the case for re-trial. Thereupon, the Plaintiff again petitioned the Defendant to perform his duty and to intervene to preserve the Plaintiff's rights under the Constitution. Despite such appeal, the Defendant wilfully refused or neglected to carry out his duty. Such refusal or neglect constituted an action of the specific kind for which Section 1986 is intended to provide redress.

WHEREFORE, the Plaintiff claims from the Defendant:

1. Five Hundred Thousand ($500,000.00) Dollars damages.
2. Five Hundred Thousand ($500,000.00) Dollars punitive damages.
3. Such other and further relief as the Court deems fair and equitable.

Dated at Bridgeport, Connecticut, this 7th day of July, 1976.

/s/ Norman F. Dacey

Norman F. Dacey
516-A Winship Drive
Bridgeport, Conn. 06488
Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NORMAN F. DACEY	:	
Plaintiff	:	
	:	CIVIL NO.
v.	:	B-76-190
	:	
PETER C. DORSEY	:	
Defendant	:	
	:	

::::::::::::::::::::::::::::::::

RULING ON DEFENDANT'S MOTION TO DISMISS

Defendant, United States Attorney for the District of Connecticut, moves to dismiss plaintiff's claim for failure to state a claim upon which relief can be granted, F.R. Civ. P. 12 (b) (6).

I

On March 1, 1976, plaintiff filed a formal complaint with the United States Attorney for the District of Connecticut alleging that the five Justices comprising the Supreme Court of the State of Connecticut were about to deprive plaintiff of his constitutional right to a fair trial by failing to disqualify themselves from hearing an appeal from a judgment in plaintiff's favor against the Connecticut Bar Association, an organization of which all the Justices were members. Plaintiff filed a separate suit against the Supreme Court Justices, alleging violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985, which action this Court

dismissed on the ground of judicial immunity, Dacey v. House et al, Civil Action No. B-76-146, February 16, 1977. Plaintiff, acting pro se, now alleges that defendant's failure to prosecute the Justices constitutes a violation of his civil rights pursuant to 42 U.S.C. § 1986.

II

The Court finds that the motion to dismiss must be granted. It is now well established that public prosecutors enjoy absolute immunity from civil suits for damages, under both the common law and 42 U.S.C. § 1983 when acting within the scope of their prosecutorial duties. Imbler v. Pachtman, 424 U.S. 409 (1976). See also Fine v. City of New York, 529 F.2d 70, 73 (1975); Dacey v. N.Y. County Lawyers' Assoc., 423 F.2d 188, 192 (2 Cir. 1969), cert. denied, 398 U.S. 929 (1970); Finale v. Sheehy, 385 F.2d 866 (2 Cir. 1969); Gregoire v. Biddle, 177 F 2d 579 (2 Cir. 1949), cert. denied, 339 U.S. 949 (1950); Yaselli v. Goff, 12 F.2d 396 (2 Cir. 1926), aff'd, 275 U.S. 503 (1927). In Imbler, the United States Supreme Court noted that:

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit of damages. Id. at 424-5.

Although Imbler was concerned with the liability of state prosecutors under § 1983, the same considerations of public policy apply to suits against federal prosecutors under § 1986. Furthermore, it is well settled that the decision whether or not to prosecute is within the discretion of the United States Attorney, and the

Attorney General of the United States. See Peek v. Mitchell, 419 F.2d 575 (6. Cir.1970); Powell v. Katzenbach, 359 F.2d 235 (D.C. Cir. 1965), cert.denied, 384 U.S. 906 (1966); United States v. Cox, 342 F.2d 167 (5 Cir.) cert. den. sub.nom. Cox v. Hauberg, 381 U.S. 935 (1965).

Accordingly, the motion to dismiss is granted.

Dated at New Haven, Connecticut, this 16th day of February, 1977.

Robert C. Zampano
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 286—September Term, 1977.

(Argued December 2, 1977 Decided January 12, 1978.)

Docket No. 77-6100

NORMAN F. DACEY,

Plaintiff-Appellant,

—against—

PETER H. DORSEY,

Defendant-Appellee.

Before:

MOORE and GURFEIN, *Circuit Judges,* and BONSAL, *District Judge.**

Appeal from a judgment entered by the District Court for the District of Connecticut (Zampano, *J.*) dismissing plaintiff's civil rights complaint for damages against the United States Attorney for Connecticut based on his alleged failure to restrain the Connecticut Supreme Court from entertaining an appeal in plaintiff's state libel suit against the Connecticut Bar Association. The Court of Appeals held: (1) the refusal by the Connecticut Supreme Court Justices to recuse themselves on grounds of their

* Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

membership in the Connecticut Bar Association did not constitute a conspiracy in violation of plaintiff's civil rights; (2) since plaintiff had no cognizable claim against the Connecticut Justices, the U.S. Attorney had no obligation to act; and (3) the U.S. Attorney had immunity for decisions made in the exercise of his official functions.

NORMAN F. DACEY, Bridgeport, Conn., *Plaintiff-Appellant Pro Se.*

RAYMOND L. SWEIGART, Assistant United States Attorney, New Haven, Connecticut (Richard Blumenthal, United States Attorney, District of Connecticut, Frank H. Santoro, Assistant United States Attorney, and Peter J. Ponziani, Law Student Intern, New Haven, Conn., of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:*

Norman F. Dacey, author of "How to Avoid Probate," obtained a $60,000 judgment for libel against the Connecticut Bar Association in a State Court of Connecticut. The Bar Association appealed to the Supreme Court of Connecticut, all of whose five justices were members of the Bar Association. Dacey sought to have the judges recuse themselves on that account. Apparently, since there was no other tribunal which was legally empowered to hear the case, the judges declined to recuse themselves.

Dacey then lodged a formal complaint with the United States Attorney for Connecticut, Peter C. Dorsey, asking him to restrain the Connecticut Supreme Court judges from allegedly conspiring to violate Dacey's civil rights contrary

to 42 U.S.C. § 1985.[1] The United States Attorney for Connecticut declined to take action, and eventually the Supreme Court of Connecticut reversed the libel judgment.

Dacey then filed a complaint in the United States District Court for Connecticut seeking money damages against United States Attorney Dorsey for his alleged failure to carry out his duties under 42 U.S.C. § 1986[2] to prevent a consummation of the alleged civil rights conspiracy against the plaintiff by the judges in violation of § 1985.

The District Court (Zampano, *J.*) dismissed the complaint, and this appeal followed. We affirm.

We do not consider the refusal of the State Supreme Court judges to recuse themselves as constituting a conspiracy under 42 U.S.C. § 1985. There is no averment in the complaint of a single fact that would justify the charge of conspiracy. The claim is simply that the failure of the judges to recuse themselves because they were members of the defendant bar association violated the plaintiff's civil rights. We need not decide whether a party, at whose instance recusal is sought and denied, ever has a claim under

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1 Section 1985(2) provides in pertinent part as follows:

"or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . ."

2 Section 1986 reads in pertinent part as follows:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; . . . ."

the civil rights statutes. In this case, there was no other forum available for the State Court appeal. When all are disqualified, none is disqualified. *Evans* v. *Gore*, 253 U.S. 245, 247-48 (1920).[3] Thus, the decision could not have been grounded in prejudice or in the denial of equal protection of the laws. The particular provision of § 1985 involved requires that the plaintiff allege a "class-based, invidiously discriminatory animus." *Hahn* v. *Sargent*, 523 F.2d 461, 469 (1st Cir. 1975); *Brawer* v. *Horowitz*, 535 F.2d 830, 839-41 (3d Cir. 1976); *see also Griffin* v. *Breckenridge*, 403 U.S. 88, 96-103 (1971). There is no allegation of a class-based animus on the part of the Connecticut judges.

In any event, the decision not to withdraw from the case was made by the judges in pursuance of their judicial function. *See Saier* v. *State Bar of Michigan, supra* note 3, 293 F.2d at 760-61. For such decisions the judges had absolute immunity from civil liability. *Pierson* v. *Ray*, 386 U.S. 547, 554-55 (1967). And even though a federal court is not wholly without power to order injunctive relief against state judges for violations of civil rights, *Mitchum* v. *Foster*, 407 U.S. 225 (1972), we can find no adequate allegation of such a violation here.

Accordingly, since there was no claim cognizable in the federal court, there was no duty upon the United States Attorney to act. Having failed to state a cause of action under § 1985, plaintiff has failed to state a claim under § 1986. *Brawer* v. *Horowitz, supra*, 535 F.2d at 841; *Hahn* v. *Sargent, supra*, 523 F.2d at 469-70; *Hamilton* v. *Chaffin*, 506 F.2d 904, 914 (5th Cir. 1975).

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3 *See also Saier* v. *State Bar of Michigan*, 293 F.2d 756, 760-61 (6th Cir.), *cert. denied*, 368 U.S. 947 (1961); *Turner* v. *American Bar Association*, 407 F. Supp. 451 (N.D. Tex. 1975) (consolidated cases), *aff'd without opinion sub nom. Taylor* v. *Montgomery*, 539 F.2d 715 (7th Cir. 1976), *aff'd sub nom. Pilla* v. *American Bar Association*, 542 F.2d 56, 58 (8th Cir. 1976). *See, In re Rhodes*, 370 F.2d 411, 413 (8th Cir.), *cert. denied*, 386 U.S. 999 (1967).

Moreover, the United States Attorney is part of the executive branch, and, as such, his official discretion is not subject to control by the judiciary at the instance of private persons. *See United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom. Cox* v. *Hauberg*, 381 U.S. 935 (1965); *Moses* v. *Kennedy*, 219 F. Supp. 762, 765 (D.D.C. 1963), *aff'd sub nom. Moses* v. *Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). *And see Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

The United States Attorney concededly did forward Mr. Dacey's complaint to the Department of Justice in Washington for its consideration. He did not attempt to suppress it. The extent of his official privilege as a federal officer is governed by federal law. *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959). Since he acted in the exercise of the discretion vested in him by virtue of his office, he is not subject to a private suit for damages. *See Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

We apply the policy of *Imbler* v. *Pachtman* to bar this claim against the United States Attorney for failure to seek injunctive relief against state judges under § 1986, regardless of whether an injunction might lie simply as a matter of federal judicial power. *See Scolnick* v. *Lefkowitz*, 329 F.2d 716 (2d Cir.), *cert. denied*, 379 U.S. 825 (1964) (complaint of violation of civil rights in civil proceeding by State Attorney General).

The judgment dismissing the complaint for failure to state a claim upon which relief can be granted is affirmed.

SUPREME COURT OF THE UNITED STATES

NO. A-653

NORMAN F. DACEY,

Petitioner,

v.

CHARLES S. HOUSE, ET AL
Respondents

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 26, 1978.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 8th day of

February, 1978.

STATE OF CONNECTICUT
Supreme Court
March 17, 1977

Mr. Norman F. Dacey
516-A Heritage Village
Southbury, Connecticut 06488

Dear Mr. Dacey:

I have just received your letter of March 10, 1977 concerning a retrial of Dacey v. Connecticut Bar Assn., 170 Conn. 521.

There are a number of judges who are not members of the Connecticut Bar Association who would be in a position to try this case. I am, therefore, sending a copy of your letter to the Honorable Irving Levine, Acting Administrative Judge of the Superior Court in Fairfield County at Bridgeport to resolve this matter.

I would also suggest that the attorneys who represent you discuss this matter with Judge Levine so that it may be reached for a trial as quickly as possible.

Very truly yours,

/s/ John P. Cotter
Justice
Chief Court Administrator

JPC/fcc

cc: Hon. Irving Levine

Judges, Legislators' Courage, 'Yes' Men

The new legislative system of open voting on judicial nominations produced a great spectacle of unanimity as the lawyer members of House and Senate voted automatically yes on every nomination that came before them.

This spectacle became so annoying to a few stray members of the legislature that they took to voting no on all judges, not as a reflection on the individuals involved, but as a reproach to the lawyers of the legislature for having pushed through the bill to compel open voting, in the first place, and for then taking refuge from the obligations of the new procedure in automatic yes voting.

ALAN H. OLMSTEAD
'THE CONNECTICUT YANKEE'

So far as promoting healthy open voting, then, the new system, in its first returns, seemed to miss its mark.

The new voting system also provided the setting for what was at least a casually significant test of the General Assembly's sensitivity to questions of propriety and ethics. This is a legislature which has expended a generous amount of time, speech, work and inspiration crusading against wicked influences. It has set up an Ethics Commission to keep itself pure and to pin badges on wicked outside influences which might attempt to approach innocent legislators.

The House of Representatives, meeting on March 2 to consider another batch of judgeships to be confirmed by open voting, found itself faced with one resolution which posed a delicate question of ethics. It was a resolution naming Seymour Hendel of New London a judge. There was, just before action began, one moment in which attention was called to the fact that this was a nomination a little out of the routine. Rep. Patricia Hendel, member of the House from New London, and the wife of Attorney Hendel, officially informed the Speaker that she would absent herself from the House during the consideration of her husband's appointment.

That complied with the standing legislative rule barring legislators from voting on matters in which they themselves might have financial involvement.

It left to the rest of the House consideration of one other minor issue, that of whether the appointment of the spouse of a member of the legislature should be considered a violation in spirit of the dual job ban law which prohibits any member of the legislature from obtaining any job which is within the gift of the legislature.

There was no open evidence that the House had had even the slightest thought about the propriety of awarding a judgeship to the spouse of one of its own members. The vote was speedy, and it was 132 to 3.

Off the floor, one of the three negative voters gave a belief that a legislator's spouse should not have been nominated as a reason for voting no. Another of the negative voters, on the other hand, was reportedly voting not against Hendel as an individual, nor against the possible offense to the spirit of the dual job ban law, but against one of the legislative policy decisions of Rep. Pat Hendel.

Judging by the House vote that day, there was no ethical issue involved. But on the other hand, again, one member of the House who later that same day became a chronic vote no on all judgeships, said she was acting that way to protest the new open voting procedure which she described as "the absolute biggest farce I've seen in my three terms." What made it a farce, Rep. Phyllis Kipp of Mystic was quoted as saying, was the fact that numerous House members complained to her about the judges up for approval that day, but then supported the nominations.

There is, of course, no way to establish what the voting might have been like if the old procedure, in which both lawyers and laymen could express their sentiments without exposing themselves to the resentment of either judges or legislative colleagues, had still been in effect. But it seems reasonable to conclude that the more courage it takes for legislators, lawyers and non-lawyers alike, to vote their own real opinion of judicial appointments, the less such voting there will be.

The New Haven (Conn.) Register
March 14, 1978

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NORMAN F. DACEY	:	
V.	:	CIVIL NO. B-77-269
HENRY J. NARUK	:	

RULING ON PLAINTIFF'S
MOTION FOR RELIEF FROM JUDGMENT

This action was instituted on August 22, 1977, by the filing of a pro se complaint against the defendant Henry J. Naruk, a judge of the Connecticut Superior Court. The plaintiff moved to disqualify defendant's counsel, claiming that the state Attorney General's office could not defend a state judge. This Court dismissed the entire action, sua sponte, since the defendant's judicial immunity constituted a complete bar to the claims for relief in plaintiff's complaint. Plaintiff then sought to vacate or amend the judgment of dismissal and to amend his complaint in an effort to have this Court review actions taken by the Connecticut Superior Court. Since this Court is obviously without appellate jurisdiction over the Connecticut Superior Court, this Court granted the motion to amend the complaint, but again dismissed the action. So that plaintiff would not be foreclosed from appeal, this Court ordered that a second judgment be entered dismissing the action. Thereafter, on November 30, 1977, plaintiff filed a notice of appeal to the

Court of Appeals, and the record has been docketed in that Court. Then on December 5, 1977, plaintiff filed a motion, under Fed. R. Civ. P. 60(b), for relief from the second judgment of dismissal and sought permission to file an affidavit of prejudice pursuant to 28 U.S.C. § 144. On January 16, 1978, plaintiff filed an unsworn document captioned "Plaintiff's Affidavit of Prejudice Filed Pursuant to Title 28, Section 144." This document requests that I recuse myself and vacate orders previously entered, on the ground that I am a member of the Connecticut Bar Association, and that plaintiff's dispute, which he was litigating in the state courts before Judge Naruk, involves a claim against the Connecticut Bar Association.

While an appeal is pending, a District Court is without jurisdiction to vacate the judgment appealed from, but it can indicate an intention to do so upon remand from the alpellate court. See, e.g., Greater Boston Television Corp. v. F.C.C., 463 F.2d 268 (D.C. Cir. 1971). Whether such an indication should be given in this case is by no means clear.

The absence of an affidavit, i.e., a sworn statement of grounds for disqualification, can perhaps be overlooked in this case, since plaintiff's sole factual allegation, my membership in the Connecticut Bar Association, is beyond dispute. Plaintiff's claim that this fact was somehow "concealed" from him and that he "just became aware" of it when he filed his motion on December 5 cannot be

accepted at face value, since plaintiff made a telephone inquiry to my chambers some weeks before the filing of his motion and was specifically told that I was a member of the Connecticut Bar Association. It is extremely doubtful that this fact affords any legal basis for disqualification. As originally filed, plaintiff alleged a dispute with Judge Naruk, and the claim against Judge Naruk, even if not barred by the doctrine of judicial immunity, would in no event be satisfied by funds of the Connecticut Bar Association. However, there are occasional situations where even though recusal is not required, it may be appropriate to eliminate even the slightest question concerning the impartiality of a judge. Since this litigation is alleged to concern a member of the judiciary, it may be appropriate, even in the absence of legally valid grounds for disqualification, to make sure that the judge deciding this case is one against whom plaintiff can make no complaint whatever. Of course, all members of this Court are members of the Connecticut Bar Association, but since this District has available to it the occasional services of visiting judges from within the Second Circuit who are not members of the Connecticut Bar Association, I am perfectly willing to vacate my prior orders in this case, recuse myself, and ask the Chief Judge of this District to make a reassignment to a visiting judge.

Whether, upon plaintiff's request for a remand of his appeal, the Court of Appeals will deem it appropriate to remand this case for such a purpose is, of course, entirely within the discretion of that Court. It may

prefer to rule on the issues on their merits, since it has only recently ruled, in litigation brought by this same plaintiff, that the basic grievance of the plaintiff -- namely, that the state court judges who have considered his state court claims should have disqualified themselves because of their membership in the Connecticut Bar Association -- is without merit. Dacey v. Dorsey, __F.2d__(2d Cir. Jan. 12, 1978).

Accordingly, the Clerk of this Court is directed to submit a copy of this Ruling to the Court of Appeals to be made part of the record in that Court in connection with plaintiff's pending appeal. If plaintiff requests the Court of Appeals to remand this case and if the Court of Appeals chooses to remand the case to permit me to vacate my prior orders, recuse myself, and request reassignment of the case, I will promptly do so, but, in view of plaintiff's notice of appeal, I am without jurisdiction to do so now.

Dated at Hartford, Connecticut, this 30th day of January, 1978.

/s/ Jon O. Newman
Jon O. Newman
United States District
Judge

FILED
APR 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1365

NORMAN F. DACEY, *Petitioner,*

v.

CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO, and WILLIAM P. BARBER, *Respondents.*

and

NORMAN F. DACEY, *Petitioner,*

v.

PETER C. DORSEY, *Respondent.*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO, AND WILLIAM P. BARBER, CHIEF JUSTICE AND ASSOCIATE JUSTICES, RESPECTIVELY, OF THE SUPREME COURT OF CONNECTICUT IN OPPOSITION

CARL R. AJELLO
Attorney General

BARNEY LAPP
Assistant Attorney General

DANIEL R. SCHAEFER
Assistant Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1365

NORMAN F. DACEY, *Petitioner,*

v.

CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO, and WILLIAM P. BARBER, *Respondents.*

and

NORMAN F. DACEY, *Petitioner,*

v.

PETER C. DORSEY, *Respondent.*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, CHARLES S. HOUSE, ALVA P. LOISELLE, JOSEPH W. BOGDANSKI, JOSEPH S. LONGO, AND WILLIAM P. BARBER, CHIEF JUSTICE AND ASSOCIATE JUSTICES, RESPECTIVELY, OF THE SUPREME COURT OF CONNECTICUT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Where a federal civil rights suit has been filed seeking damages against Justices of the State Supreme Court for their refusal to disqualify themselves in an appeal, was not the District Court correct in dismissing the Complaint on the basis of judicial immunity?

STATEMENT OF THE CASE

Plaintiff-petitioner, Norman F. Dacey acting *pro se*, filed a federal civil rights action against the Chief Justice and four (4) Associate Justices of the State Supreme Court of Connecticut. He sought Ten Million Dollars ($10,000,000.00) damages for their refusal to disqualify themselves in an appeal which had been brought by the Connecticut Bar Association from a Sixty Thousand Dollar ($60,000) jury verdict that had been rendered in Mr. Dacey's favor on June 13, 1974. The federal Complaint, brought pursuant to 42 U.S.C. § 1983 and citing as jurisdiction 28 U.S.C. § 1343, was filed in the United States District Court for the District of Connecticut on May 20, 1976. After a hearing, the Court, the Honorable Robert C. Zampano, United States District Judge, granted the Motion To Dismiss on February 16, 1977, which had been filed by the defendant-respondent Justices. The plaintiff then moved to amend or alter the Judgment on March 2, 1977. The motion was denied by the Court on May 19, 1977.

An appeal was subsequently taken to the U.S. Court of Appeals for the Second Circuit, which affirmed the judgment on October 28, 1977 on the basis of "the well-established principle that judges are absolutely immune from suits for damages based on acts within their jurisdiction." Appendix to petition, pp. C-1-2. A petition for rehearing was denied on November 28, 1977.[1]

The basic facts of the Complaint may be gleaned from the decision of the State Supreme Court which the District Court judicially noticed, *Norman F. Dacey* v. *Connecticut Bar Association*, 170 Conn. 520, 368 A.2d 125 (1976), together with the Record in that case contained in A-607, Connecticut

[1] It is noted that in the companion suit against Respondent Dorsey, the Respondent Justices were not parties.

Supreme Court Records And Briefs, Part 1, (December Term, 1975).

Mr. Dacey is the author of a book entitled *"How To Avoid Probate!"*. Subsequent to the publication of this book, the Connecticut Bar Association published a pamphlet entitled *"Understanding Probate! or Don't Be Dead-Wrong!"*. Mr. Dacey then brought an action for libel against the Bar Association based upon statements contained in that pamphlet. He obtained a jury award of Sixty Thousand Dollars ($60,000) in general damages in addition to exemplary damages of $7,887.50 in the Superior Court for Fairfield County. An appeal from this verdict and judgment was taken by the Bar Association to the State Supreme Court.

On October 24, 1974, counsel for both parties in that case were notified by the Reporter of Judicial Decisions as follows:

> "The Chief Justice further requested that I bring to your attention the fact that all justices of the Supreme Court are members of The Connecticut Bar Association and to inquire if either of you intends to raise this issue as a possible bar to their hearing the appeal."
>
> Appendix to plaintiff's State Supreme Court Brief, pp. 15a-16a, contained in *Records And Briefs, supra.*

Mr. Dacey then moved on or about November 3, 1974, that the Justices of the Supreme Court disqualify themselves from hearing the appeal. The motion was denied on November 12, 1974.[2]

The Board of Governors of the Connecticut Bar Association then adopted a resolution on January 20, 1975, providing in essence that the dues of any Superior Court Judge and Supreme Court Justice who participated in any stage in the *Dacey* case

[2] See Complaint, Paragraphs 19 and 20, petitioner's appendix p. A 7.

would be suspended in an amount equal to the pro rata share owed by each member of the Bar Association for satisfaction of any money judgment in favor of the plaintiff. (Appendix to plaintiff's State Supreme Court Brief, pp. 16a-17a, contained in *Records And Briefs, supra.)*

It is also noted that the pro rata share of each member for the amount of the verdict, exemplary damages and interest as of November 1, 1975 was calculated at approximately $16.33. (Appendix to defendant's State Supreme Court Reply Brief, p. 1a, contained in *Records And Briefs, supra.)*

As the State Supreme Court pointed out in its opinion, a full appellate court could not be formed from among the total membership of that court as well as the Superior Court (the trial court of general jurisdiction) if members of the Connecticut Bar Association were to be excluded. *Dacey* v. *Connecticut Bar Association, supra,* 170 Conn. at 524. Thus, it is obvious that plaintiff-petitioner's attempt to have the Supreme Court recuse itself would have had the coincidental effect of precluding any appeal from the judgment obtained in his favor. It would have virtually denied the defendant, the Connecticut Bar Association, a hearing before any appellate tribunal. The only exception to this would have been the hypothetical possibility of seeking a petition for a writ of certiorari from the United States Supreme Court to the Superior Court, not the State Supreme Court, a recourse which was at best speculative and remote.

The State Supreme Court also indicated that apart from the resolution of the Bar Association which would have avoided any contribution by the justices in payment of the judgment, the pecuniary interest of each member of the Court was in essence *de minimis.* It was comparable to that of a judge who presides in a tax appeal involving a town in which he was a taxpayer. *Id.* at 523-4.

Accordingly, the State Supreme Court heard the appeal and held that the evidence in the lower court was required to prove actual malice with "convincing clarity" pursuant to *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285-286 (1964) and other U.S. Supreme Court decisions dealing with First Amendment considerations where a public figure is the subject of criticism.[3] The judgment was set aside due to the refusal of the Superior Court judge to charge the jury to this effect, and a new trial was ordered. The State Supreme Court's decision was released on April 6, 1976.

No petition for certiorari was filed or other form of review by the U.S. Supreme Court sought in respect to the State Supreme Court ruling. Instead, the § 1983 damage suit was lodged in Federal District Court as previously stated.

• • •

Several other matters may be briefly noted. Plaintiff-petitioner in his brief states that the U.S. District Court Judge, (Zampano, J.), who was also a member of the Connecticut Bar Association,

> ". . . declined to recuse or disqualify himself, even when reminded that Canon 3 required him to disqualify himself if his impartiality 'might reasonably be questioned,' and despite the existence of Title 28 U.S. Code Sections 144 and 455. . . ."
>
> Petition, p. 13.

The plaintiff-petitioner, however, fails to disclose that Judge Zampano expressly gave him an opportunity to file a motion

---

[3] It was stipulated in the State Superior Court that plaintiff, whose book, *"How To Avoid Probate!"* had sold nearly one million copies up to that time, was a public figure. Appendix to defendant's State Supreme Court brief, p. 1a, 37a, contained in *Records And Briefs, supra.*

to disqualify, but that the plaintiff-petitioner declined to do so. The Transcript in this respect is as follows:

"MR. DACEY: I wondered if your Honor was identified with or associated or otherwise connected with any of the parties to this controversy, specifically, the Connecticut Bar Association. I assume, were you, you would have disclosed it.

"THE COURT: I'm a member of the Connecticut Bar Association —

"MR. DACEY: Does your Honor —

"THE COURT: — I was a lawyer for some years.

"MR. DACEY: I see. Has your Honor considered the applicability of Title 28, Section 455?

"THE COURT: Well, are you moving pursuant to that? I'll entertain a motion.

"MR. DACEY: I'm merely inviting your Honor to indicate that he is completely impartial.

"THE COURT: Well, I hope so. I feel so. But if there's a motion, I will entertain it. I am a member of the Connecticut Bar Association, of course. I have been a member for a good many years. And the American Bar Association.

"MR. DACEY: Yes. Section 455 apparently places the burden upon the judge to disqualify himself if there exists any impediment, and so I will leave it to your Honor.

"THE COURT: Very well. Your comments are noted. Anything further?

"MR. DACEY: Thank you, sir.

"THE COURT: All right, we will reserve."

Tr., pp. 2-4.

The petition for certiorari is incorrect in another respect in referring to a related case brought by the petitioner against another judge, *Norman F. Dacey* v. *Henry J. Naruk*, U.S.D.C., D.Conn. Civ. No. B-77-269, Jan. 30, 1978. The petition states:

> ". . . When Dacey learned that Judge Newman was in fact a member of the Bar Association, he filed an Affidavit of Prejudice under Title 28 U.S.C. Code Section 144, calling upon Judge Newman to vacate his rulings and recuse himself. This Judge Newman did, acknowledging that the fact of his membership in the Association could raise a question of his impartiality. The action is now awaiting assignment to a visiting judge from outside the Connecticut District. . . ."

Petition, p. 16.

A similar representation is made in page 5 of the Petition to the effect that Judge Newman had ruled that "a judge holding membership in the Connecticut Bar Association should properly recuse himself in any action involving the Association."

Judge Newman did not rule that disqualification was required. Instead, he stated that he was willing to do so to avoid any possible question, even though it was "extremely doubtful" that recusal was necessary in that case.

The pertinent portion of his ruling states:

> "The absence of an affidavit, i.e., a sworn statement of grounds for disqualification, can perhaps be overlooked in this case, since plaintiff's sole factual allegation, my membership in the Connecticut Bar Association, is beyond

dispute. Plaintiff's claim that this fact was somehow 'concealed' from him and that he 'just became aware' of it when he filed his motion on December 5 cannot be accepted at face value, since plaintiff made a telephone inquiry to my chambers some weeks before the filing of his motion and was specifically told that I was a member of the Connecticut Bar Association. It is extremely doubtful that this fact affords any legal basis for disqualification. As originally filed, plaintiff alleged a dispute with Judge Naruk, and the claim against Judge Naruk, even if not barred by the doctrine of judicial immunity, would in no event be satisfied by funds of the Connecticut Bar Association. However, there are occasional situations where even though recusal is not required, it may be appropriate to eliminate even the slightest question concerning the impartiality of a judge. Since this litigation is alleged to concern a member of the judiciary, it may be appropriate, even in the absence of legally valid grounds for disqualification, to make sure that the judge deciding this case is one against whom plaintiff can make no complaint whatever. Of course, all members of this Court are members of the Connecticut Bar Association, but since this District has available to it the occasional services of visiting judges from within the Second Circuit who are not members of the Connecticut Bar Association, I am perfectly willing to vacate my prior orders in this case, recuse myself, and ask the Chief Judge of this District to make a reassignment to a visiting judge."

Appendix to Petition, pp. K-2 - K-3.

ARGUMENT

A.

DAMAGES AGAINST STATE SUPREME COURT JUSTICES BARRED BY JUDICIAL IMMUNITY.

We begin with the recent decision reaffirming the well recognized principles of judicial immunity in *Stump, et al. v. Sparkman*, —— U.S. ——, 46 U.S.L.W. 4253 (March 28, 1978). In that case the Court stated:

> "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' Bradley v. Fisher, supra, at 347. For that reason the Court held that 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547 (1967)."

Id. at 4255.

In *Pierson* v. *Ray*, 386 U.S. 547 (1967), cited by the Court in *Stump, et al.* v. *Sparkman, supra*, it was held that a municipal police justice who had entered convictions in a criminal case was immune from damages even though one of the

convictions was ultimately reversed on appeal and the other charges subsequently withdrawn. The Court stated:

> ". . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."
>
> *Id.* at 553-554.

The doctrine of immunity, of course, is traceable to *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 at 347 (1872), wherein the Court emphasized:

> ". . . For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. . . ."

In an effort to evade this doctrine, plaintiff-petitioner claims that there was no jurisdiction because the State Supreme Court Justices erroneously denied the motion for disqualification.

First, it is noted that the petition contains the following quotation purportedly taken from *Gruman* v. *Raymond and Betts*, 1 Conn. 39 (1814):

> " 'There must be a jurisdiction of the process as well as of the person and cause. *There is no process sanctioned by law in which a disqualified judge may serve on the bench.* Where there is a want of jurisdiction over the cause, it is the same as though there were no court. It is coram-non-judice. . . . Although here the justice had jurisdiction over the subject matter, yet he had *no* jurisdiction over the *process* (emphasis added).' "
>
> Petition, p. 40. (Emphasis in the petition.)[4]

The sentence which is underscored and which reads, "There is no process sanctioned by law in which a disqualified judge may serve on the bench," does not appear in any portion of the reported decision. The petition, moreover, does not appear to cite the specific page in the opinion which supposedly contains this language concerning the disqualified judge. With some modification, the first sentence in the quotation above is evidently taken from page 43 of the decision, the third sentence from page 44 and the fourth sentence from pages 46-7

[4] A portion of this quotation also appears at p. 53 of the petition.

of the case. However, the second sentence, as to disqualification, can not be found at all in the reported ruling.[5]

Wholly apart from this, the Court in *Stump, et al.* v. *Sparkman, supra,* cautioned that the concept of jurisdiction for the purpose of immunity should be liberally interpreted. There is a definite distinction between "excess of jurisdiction" and "clear absence of all jurisdiction over the subject matter." 46 U.S.L.W. at 4255, n. 6. The Court also stated:

> ". . . Because 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .,' Bradley, supra, at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' 13 Wall., at 351."

Id. at 4255.

The principles of immunity, of course, are intended to ensure that justice is administered without fear or favor and that judgments are rendered on a true and principled basis.

> ". . . Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.' Bradley v. Fisher, 13 Wall., at 347. . . ."

[5] We have reviewed both the 1848 and 1924 publications of this case for this purpose.

Id. at 4257.
See also Imbler v. *Pachtman,* 424 U.S. 409, 418, 422-23, N. 20 at 423 (1976).

B.

INJUNCTION CLAIM UNWARRANTED.

The plaintiff-petitioner also claims that the District Court erred in not granting injunctive relief. First, it should be noted that the prayer for relief contained in the Complaint was as follows:

> "WHEREFORE, the Plaintiff claims from the Defendants:
>
> "1. Five Million ($5,000,000.00) Dollars damages.
>
> "2. Five Million ($5,000,000.00) Dollars punitive damages.
>
> "3. Such other and further relief as the Court deems fair and equitable."
>
> Complaint, p. 10, contained in the appendix to the petition, p. A 15.

The record does not disclose that Mr. Dacey ever asked for an injunction or any other specific form of equitable relief. In fact, Mr. Dacey, in his Memorandum in opposition to the motion to dismiss dated June 21, 1976, filed in the District Court, expressly stated:

> ". . . The Plaintiff repeats: this is not an attack upon any State court proceedings; it is an action for damages against *five* individuals who deliberately violated both

State and Federal law. . . ." (Emphasis contained in the brief as quoted.)

Id., p. 2.

The request for other relief which is fair and equitable might arguably provide a sufficient basis for a trial court in fashioning equitable remedies not specifically sought in the Complaint. It is quite another thing, however, to utilize such language as grounds for seeking a reversal of the trial court for not granting an injunction that had never been applied for as such.

In any event, it is just too late in the day to override "the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster*, 407 U.S. 242 at 244 (1972). These considerations were applied only last term to federal injunctive relief against enforcement of a judgment affirmed by a State Supreme Court. *Vendo Co.* v. *Lektro-Vend Corp.*, —— U.S. ——, 97 S.Ct. 2881 (1977). It is true that the decision was based upon the Anti-Injunction Act (28 U.S.C. § 2283) which was held to preclude such intervention. However, the Court also emphasized the "historical concepts of federalism" underlying that provision. *Id. at* 2891. *See also, id.* at 2886-7. *Cf. also Trainer* v. *Hernandez*, —— U.S. ——, 97 S.Ct. 1911 (1977); *Judice* v. *Vail*, —— U.S. ——, 97 S. Ct. 1211 (1977); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 601-602, *reh. den.*, 421 U.S. 971 (1975); *Younger* v. *Harris*, 401 U.S. 37 (1971).

It should further be noted that collateral attack and relitigation of a state court judgment at this point raises serious questions, to say the very least, by reason of "the normal rules of res judicata and judicial estoppel." *Huffman* v. *Pursue, Ltd., supra*, at 607, n. 18. *Cf. also Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), wherein the Court noted that "*res judicata* has been

held to be fully applicable to a civil rights action brought under § 1983." *Id.* at 498.

C.

RECUSAL BY STATE SUPREME COURT INAPPROPRIATE.

As a matter of general background and information, the Connecticut Supreme Court in its decision, *supra*, provided the following reasons for its refusal to disqualify itself:

> "At the outset, the plaintiff has challenged the propriety of this court's determining the appeal. Every justice of this court is a member of the defendant association. The plaintiff's counsel does not claim personal bias on the part of any member of this court but claims that the appearance of impropriety is in issue. Further, the plaintiff suggests that the impartiality of the members of this court has been and will be questioned.
>
> "The plaintiff cites General Statutes § 51-39 and Canons 1, 2 and 3 of the Code of Judicial Conduct and argues that the special resolution passed by the defendant whereby any judge or justice who may participate in the case is exempt from the payment of any judgment rendered against the defendant is, in fact, an admission by the defendant that the members of this court have a pecuniary interest in the outcome of this appeal.
>
> "A challenge on the basis of disqualification of a judge or justice is not one which can be considered lightly. This state early has taken the view that any judge having an interest in a pending case should disqualify himself from hearing the case. Wood v. Hartford Fire Ins. Co., 13 Conn. 202, 211; see also Nettleton's Appeal, 28 Conn. 268; Cabot Bank's Appeal, 26 Conn. 7.

"In the event that the plaintiff should prevail in this appeal, the defendant has voted that the dues of each justice would be reduced so that none of the justices would contribute to the payment of the judgment. Whether this is done or not, the pecuniary interest of each justice is de minimis and is comparable to the interest of the judge that determines the tax appeal of a litigant against a town where a judge is a taxpayer. We fail to see any conflict concerning the nonfinancial interests. Furthermore, it has been held that membership in a bar association or integrated bar is not a basis for disqualification in a case in which a bar association is a party. Minnesota State Bar Assn. v. Divorce Education Associates, 300 Minn. 323, 219 N.W. 2d 920, cert. denied, sub nom. Thibodeau v. Minnesota State Bar Assn., 419 U.S. 1023, 95 S. Ct. 500, 42 L.Ed. 2d 297; In re Rhodes, 370 F.2d 411, cert. denied, 386 U.S. 999, 87 S.Ct. 1321, 18 L.Ed. 2d 349; see 46 Am. Jur. 2d, Judges, § 121.

"During oral argument when the plaintiff's counsel was told that a full court could not be formed from among the total membership of this court and the Superior Court who were not members of the defendant, counsel suggested that this court find the issues for the plaintiff and let the defendant attempt to obtain certiorari from the United States Supreme Court.

"Article fifth, § 1, of the state constitution vests the judicial power of the state in the courts. The Supreme Court exercises appellate jurisdiction as defined by law. This judicial responsibility is an attribute to sovereignty. There is a limitation upon the right or duty of judges to disqualify themselves. 'Disqualification must yield to necessity where to disqualify would destroy the only tribunal in which relief could be had and thus preclude determination of the issue. In such case it has been held,

consistently, the court must act no matter how disagreeable its task may be.' New Jersey State Bar Assn. v. New Jersey Assn of Realtor Boards, 118 N.J. Super. 203, 209, 287 A.2d 14; see Evans v. Gore, 253 U.S. 245, 247-48, 40 S.Ct. 550, 64 L.Ed. 887; Moulton v. Byrd, 224 Ala. 403, 405, 140 So. 384; Federal Construction Co. v. Curd, 179 Cal. 489, 493-94, 177 P. 469; Wheeler v. Board of Trustees, 200 Ga. 323, 326-28, 37 S.E. 2d 322; Long v. Watts, 183 N.C. 99, 102, 110 S.E. 765; First American Bank & Trust Co. v. Ellwein, 221 N.W. 2d 509, 515-16 (N.D.), cert. denied, 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed. 2d 301; Alamo Title Co. v. San Antonio Bar Assn., 360 S.W. 2d 814, 817 (Tex. Civ. App.) (application for writ of error refused, no reversible error); see also 46 Am. Jur. 2d, Judges, § 89.

"The defendant is entitled by law to appeal to this court. General Statutes § 52-263. There is no other appellate tribunal to which, under the law, the defendant can appeal. It was sued and a verdict was rendered against it. It brought the appeal in due course. Both parties have orally argued the appeal and both have submitted extensive briefs. In this situation, the only course open to us is to consider the arguments and decide the appeal. See Evans v. Gore, supra."

Dacey v. *Connecticut Bar Assn.*, *supra*, 170 Conn. 520, 522-525.

It should also be noted that in a recent decision the United States Court of Appeals for the Eighth Circuit held that mere membership in a state bar association was not cause for disqualification of members of the Court. The case involved a suit for injunctive relief as well as for damages based upon escrow account procedures. It was alleged that mortgagors were entitled to interest on funds escrowed by banks

for the purpose of taxes and insurance payments. The disqualification issue was dealt with by the Court as follows:

> "The grounds alleged by appellants for disqualification of the members of this court are (1) that the members of this court are involved with or are members of, the Minnesota Bar Association, both of which were defendants in a separate class action suit brought by the appellants and (2) that the members of this court have a 'unique relationship' with the members of the legal profession and the financial interests in the state of Minnesota and as such cannot render a fair and impartial decision. Such vague allegations of prejudice are insufficient to require disqualification of any member of this court. 28 U.S.C. § 455. See Wounded Knee Legal Defense/Offense Committee v. F.B.I., 507 F.2d 1281, 1285 (8th Cir. 1974)."
>
> *Scarrella* v. *Midwest Federal Savings and Loan*, 536 F.2d 1207 at 1209 (1976) *(per curiam) cert. den.* —— U.S. ——, 97 S.Ct. 237 (1976).

Concerning frivolous attacks upon the dignity and integrity of the judiciary, see *Town of East Haven* v. *Eastern Airlines, Inc., et al.*, 304 F.Supp. 1223 at 1225 (D.Conn. 1969) (Timbers, Chief Judge); previous decision in same case denying motion to disqualify all Connecticut federal judges, 293 F.Supp. 184 (D. Conn. 1968). *See generally, Berger* v. *United States,* 255 U.S. 22, 33-35 (1921); *Wolfson* v. *Palmieri,* 396 F.2d 121, 124 (2d Cir. 1968).

CONCLUSION

It is readily apparent that the petition for certiorari is not only without merit, but also frivolous. There is no showing whatsoever of any special or important reason for granting a writ of certiorari in this case, a writ which is not a matter of

right but instead of sound judicial discretion. Nor is there any indication that the lower courts have departed from the accepted and usual course of judicial proceedings within the meaning of Rule 19, Revised Rules of the Supreme Court of the United States.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Respondents Charles S. House, Alva P. Loiselle, Joseph W. Bogdanski, Joseph S. Longo, and William P. Barber, Chief Justice and Associate Justices, respectively, of the Supreme Court of Connecticut, certify that on the 21st day of April, 1978, I served a copy of the foregoing Brief by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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